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No. 14-

IN THE

Supreme Court of the United States

MOST REVEREND DAVID A. ZUBIK, ET AL.,
Petitioners,

v.

SYLVIA MATHEWS BURWELL, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR CERTIORARI

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QUESTION PRESENTED

1. Whether the HHS Mandate and its "accommodation" violate the Religious Freedom Restoration Act ("RFRA") by forcing religious nonprofits to act in violation of their sincerely held religious beliefs, when the Government has not proven that this compulsion is the least restrictive means of advancing any compelling interest.

2. Whether RFRA allows the Government to divide the Catholic Church by creating a narrow "religious employer" exemption that applies to "houses of worship" but excludes the Church's separately incorporated nonprofit entities that implement core Catholic teaching by providing charitable and educational services to their communities.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners, who were Plaintiffs below, are the Most Reverend David A. Zubik, the Roman Catholic Diocese of Pittsburgh, Catholic Charities of the Diocese of Pittsburgh, Inc., the Most Reverend Lawrence T. Persico, the Roman Catholic Diocese of Erie, St. Martin Center, Inc., Prince of Peace Center, Inc., and Erie Catholic Preparatory School. No Petitioner has a parent corporation. No publicly held corporation owns any portion of any of the Petitioners, and none of the Petitioners is a subsidiary or an affiliate of any publicly owned corporation

Respondents, who were Defendants below, are Sylvia Mathews Burwell, in her official capacity as Secretary of the United States Department of Health and Human Services; the United States Department of Health and Human Services; Thomas E. Perez, in his official capacity as Secretary of the United States Department of Labor; the United States Department of Labor; Jacob J. Lew, in his official capacity as Secretary of the United States Department of the Treasury; and the United States Department of the Treasury.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners are nonprofit Catholic organizations and Bishops who exercise their religion by providing health coverage to their employees in a manner consistent with their religious beliefs. As part of that religious exercise, Petitioners have historically provided their employees with health plans that exclude coverage for abortifacients, contraceptives, and sterilization. The Government, however, has promulgated a regulatory mandate that makes it effectively impossible for Petitioners to continue that religious exercise. Instead, the mandate forces Petitioners to choose between violating their religious beliefs or else incurring massive penalties.

In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), this Court held that the Government substantially burdens religious exercise whenever it forces plaintiffs to "engage in conduct that seriously violates their religious beliefs" on pain of "substantial" penalties. *Id.* at 2775-76. Here the challenged regulations do precisely that, in two specific ways. First, they force Petitioners to submit a "self-certification" or "notification" document that facilitates provision of the objectionable coverage to Petitioners' employees in connection with Petitioners' own health plans. And second, they force Petitioners to maintain an objectionable contractual relationship with the company that will provide or procure the mandated coverage to their employees. It is undisputed that Petitioners sincerely believe that taking these actions would make them complicit in sin. And it is equally undisputed that if Petitioners refuse to take these actions, they will incur ruinous penalties.

In the decision below, the Third Circuit disregarded *Hobby Lobby* and held that the regulations do not impose a substantial burden on Petitioners' religious exercise because the required actions—i.e., submitting the objectionable documentation and maintaining the objectionable contractual relationship—do not *really* make Petitioners complicit in sin. The court expressly held that "the submission of the self-certification form does not make [Petitioners] 'complicit' in the provision of contraceptive coverage," but rather "relieves [Petitioners] of any connection" to the coverage. Pet.App.36a, 44a. That statement is squarely contrary to *Hobby Lobby*'s holding that religious believers must decide *for themselves* whether an act "is connected" to illicit conduct "in a way that is sufficient to make it immoral." 134 S. Ct. at 2778. The Third Circuit simply ignored the undisputed testimony and record evidence in this case establishing that Petitioners sincerely believe that complying with the regulations would make them complicit in sin, and instead "[a]rrogat[ed]" for itself "the authority to provide a binding national answer to th[at] religious and philosophical question." *Id.*

Certiorari is warranted for three reasons. First, the decision below "conflicts with" *Hobby Lobby* and this Court's other precedents, which make clear that courts cannot second-guess a plaintiff's sincere religious belief that taking a particular action would make him complicit in sin. Sup. Ct. R. 10(c). Second, the decision below reflects growing confusion and division in the lower courts regarding the proper test for a "substantial burden" on religious exercise under RFRA. And third, this case implicates an

exceptionally important issue of religious liberty that affects thousands of similarly situated nonprofit religious organizations around the country, all of whom the Government has artificially and irrationally excluded from its narrow exemption for "religious employers."

OPINIONS BELOW

The opinion of the district court is reported at 983 F. Supp. 2d 576. Pet.App.50a-130a. The opinion of the Third Circuit is reported at 778 F.3d 422. Pet.App.1a-49a.

JURISDICTION

The judgment of the Third Circuit was entered on February 11, 2015. That court denied rehearing en banc on April 6, 2015. Pet.App.137a. This Court has jurisdiction under 28 U.S.C. §§ 1254(1).

LEGAL PROVISIONS INVOLVED

The following provisions are reproduced in Appendix I (Pet.App.155a): 42 U.S.C. §§ 2000bb-1, 2000bb-2, 2000cc-5, 300gg-13; 26 U.S.C. §§ 4980D, 4980H; 26 C.F.R. §§ 54.9815-2713, 54.9815-2713A, 54.9815-2713AT; 29 C.F.R. §§ 2510.3-16; 2590.715-2713, 2590.715-2713A; 45 C.F.R. §§ 147.130, 147.131.

STATEMENT OF THE CASE

A. The Mandate

The Patient Protection and Affordable Care Act ("ACA") requires "group health plan[s]" and "health insurance issuer[s]" to cover women's "preventive care." 42 U.S.C. § 300gg-13(a)(4) (the "Mandate"). If an employer's health plan does not include the required coverage, the employer is subject to

penalties of $100 per day per affected beneficiary. 26 U.S.C. § 4980D(b). Dropping health coverage likewise subjects employers with more than fifty employees to penalties of $2,000 per year per employee after the first thirty employees. *Id.* § 4980H(a), (c)(1).

Congress did not define women's "preventive care." The Department of Health and Human Services ("HHS") also declined to define the term in the first instance and instead outsourced the definition to the Institute of Medicine ("IOM"). 75 Fed. Reg. 41,726, 41,731 (July 19, 2010). The IOM then determined that "preventive care" includes "[a]ll [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." HRSA, Women's Preventive Services Guidelines, http://www.hrsa.gov/womensguidelines (last visited May 27, 2015); *see* 26 C.F.R. § 54.9815-2713(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv). [1] FDA-approved contraceptive methods include drugs and devices (such as Plan B and ella) that can induce an abortion. *See Hobby Lobby*, 134 S. Ct. at 2762-63 & n.7.

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[1] One dissenting IOM committee member stated that "the committee process for evaluation of the evidence lacked transparency and was largely subject to the preferences of the committee's composition. Troublingly, the process tended to result in a mix of objective and subjective determinations filtered through a lens of advocacy." IOM, Clinical Preventive Services for Women: Closing the Gaps 232 (2011), *available at* http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx.

1. Full Exemptions from the Mandate

From its inception, the Mandate exempted numerous health plans covering millions of people. For example, certain plans in existence at the time of the ACA's adoption are "grandfathered" and exempt from the Mandate as long as they do not make certain changes. 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-1251T(g). Thus, by the Government's own estimates, as of the end of 2013, over 90 million individuals participated in health plans excluded from the Mandate's scope. 75 Fed. Reg. 34,538, 34,552-53 (June 17, 2010); *Geneva Coll. v. Sebelius*, 941 F. Supp. 2d 672, 684 & n.12 (W.D. Pa. 2013).

Additionally, in acknowledgement of the burden the Mandate places on religious exercise, the Government created a full exemption for plans sponsored by entities it deems "religious employers." 45 C.F.R. § 147.131(a). That category, however, is defined to include only religious orders, "churches, their integrated auxiliaries, and conventions or associations of churches." 45 C.F.R. § 147.131(a) (citing 26 U.S.C. § 6033(a)(3)(A)(i) & (iii)). These entities are allowed to offer health coverage in a manner consistent with their religious beliefs through an insurance company or TPA that will exclude coverage for abortifacients, contraceptives, and sterilization services. *See* 78 Fed. Reg. 39,870, 39,873 (July 2, 2013). Notably, this exemption is available for *all* qualifying religious employers, even those that have no objection whatsoever to the mandated products and services. 45 C.F.R. § 147.131(a).

At the same time, the "religious employer" exemption does *not* apply to many devoutly religious

nonprofit groups that *do* object to abortifacient and contraceptive coverage, including Petitioners Catholic Charities of the Diocese of Pittsburgh, Prince of Peace Center, St. Martin Center, and Erie Catholic Preparatory School. According to the Government, these nonprofit religious groups do not qualify as "religious employers" and thus do not merit an exemption because they are not as "likely" as "[h]ouses of worship and their integrated auxiliaries" "to employ people of the same faith who share the same objection" to "contraceptive services." 78 Fed. Reg. at 39,874. In other words, the Government maintains that Catholic Charities of Erie, which qualifies for the exemption as an "integrated auxiliary," is more "likely" to employ co-religionists than Petitioner Catholic Charities of Pittsburgh—an organization that is identical in all material respects, save for the fact that it does not meet that narrow regulatory definition. The Federal Register offers no evidentiary support for this assertion.

2. The "Accommodation"

Despite sustained criticism, the Government refused to expand the "religious employer" exemption to cover all objecting religious nonprofit groups, and instead offered them an inaptly named "accommodation." 78 Fed. Reg. at 39,871 (July 2, 2013). The so-called accommodation is designed to relieve the obligation to *pay for* abortifacient and contraceptive coverage. But unlike the full exemption for "religious employers," it does not relieve the obligation to *facilitate* such coverage. Under the accommodation, religious objectors have no way to provide health coverage in a manner

consistent with their religious beliefs, but instead are forced to take specific actions that they believe immorally facilitate the delivery of coverage for abortifacients, contraceptives, and sterilization services.

i. The Original "Accommodation"

The original accommodation was promulgated in July 2013. To be eligible for the accommodation, an entity must (i) "oppose[] providing coverage for some or all of [the] contraceptive services"; (ii) be "organized and operate[] as a nonprofit entity"; (iii) "hold[] itself out as a religious organization"; and (iv) provide a "self-certifi[cation]" to its insurance company or third-party administrator ("TPA") declaring that it meets the first three criteria. 26 C.F.R. § 54.9815-2713A(a), (b)(1), (c)(1); 29 C.F.R. § 2590.715-2713A(a), (b)(1), (c)(1); 45 C.F.R. § 147.131(b), (c)(1). By submitting the self-certification, the eligible organization authorizes, obligates, and/or incentivizes its insurance company or TPA to arrange "payments for contraceptive services" for beneficiaries enrolled in its health plan. 26 C.F.R. § 54.9815-2713A. Although the TPA or insurance company is not allowed to charge the religious organization for the objectionable coverage, the regulations specify that coverage for abortifacient and contraceptive services is available to beneficiaries only "so long as [they] are enrolled in [the organization's] health plan." 29 C.F.R. § 2590.715-2713A(d).

The accommodation has additional implications for organizations that offer self-insured health plans. The Government concedes that in the self-insured context, "'the contraceptive coverage is part of the

[self-insured organization's health] plan.'" *Roman Catholic Archbishop of Wash. v. Sebelius*, 19 F. Supp. 3d 48, 80 (D.D.C. 2013). The self-certification is deemed to be an "instrument under which the plan is operated," 29 C.F.R. § 2510.3-16(b), and serves as the "designation of the [organization's TPA] as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. at 39,879. Consequently, the TPA of a self-insured health plan has no authority to provide abortifacient and contraceptive benefits to the plan beneficiaries *unless* the sponsoring organization provides the self-certification.

In addition, once an eligible organization submits the self-certification, it creates a unique incentive for its TPA to provide abortifacient and contraceptive coverage: under the accommodation, TPAs are eligible to be reimbursed for the full cost of the objectionable coverage they provide to the eligible organization's beneficiaries, plus an additional 15 percent. 45 C.F.R. § 156.50; 79 Fed. Reg. 13,744, 13,809 (Mar. 11, 2014). That incentive is not triggered unless and until the eligible organization invokes the accommodation.

Finally, in order to comply with the "accommodation," a self-insured organization must "contract[] with one or more third party administrators." 26 C.F.R. § 54.9815-2713AT(b)(1)(i). At the same time, however, the regulations impose no obligation on TPAs "to enter into or remain in a contract with the eligible organization." 78 Fed. Reg. at 39,880. Consequently, religious organizations that invoke the accommodation are required to either maintain a contractual relationship with a TPA that

will provide or procure the objectionable coverage to their plan beneficiaries, or else find and contract with a TPA willing to do so.

ii. The Revised "Accommodation"

After the district court's order entering an injunction in this case, the Government issued a revised version of the accommodation that offers nonexempt religious nonprofits an "alternative process" for complying with the Mandate. 79 Fed. Reg. 51,092, 51,094 (Aug. 27, 2014). The revision is immaterial. The primary change is that rather than submitting a self-certification directly to its insurance company or TPA, an objecting religious nonprofit entity may trigger the accommodation by notifying *the Government*. The required notice must include "the name of the eligible organization," its "plan name and type," and "the name and contact information for any of the plan's [TPAs] and health insurance issuers." 26 C.F.R. §§ 54.9815-2713AT(b)(1)(ii)(B), (c)(1)(ii); 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B), (c)(1)(ii); 45 C.F.R. § 147.131(c)(1)(ii). Upon receiving that notice, the Government in turn must notify the organization's insurance company or TPA, which then becomes authorized, obligated, and incentivized to provide payments for the objectionable products and services for the religious organization's plan beneficiaries, just like under the original accommodation. *See* 26 C.F.R. § 54.9815-2713AT(b)(2), (c); 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B), (b)(2), (c); 45 C.F.R. § 147.131(c)(1)(ii), (c)(2)(i).

The self-certification under the original accommodation and the notification under the revised accommodation have the same effect.

Whether an "eligible organization" submits the self-certification form or the notice to the Government, its insurance company or TPA is authorized and obligated to arrange "payments for contraceptive services" for participants and beneficiaries of the organization's health plan. 26 C.F.R. § 54.9815-2713AT(b)(2), (c); 29 C.F.R. § 2590.715-2713A(b)(2), (c); 45 C.F.R. § 147.131(c)(2)(i). The insurance issuer or TPA's obligation to provide the "payments" takes effect only "[w]hen" and "[i]f" a religious organization submits the self-certification or notification. 29 C.F.R. § 2590.715-2713A(b)(2), (c); 45 C.F.R. § 147.131(c). Thus, in either scenario, the authority, obligation, and incentive to provide payments for abortifacient and contraceptive coverage arise only if the religious organization submits an objectionable notice, and payments are available only "so long as [beneficiaries] are enrolled in [the organization's] health plan." 26 C.F.R. § 54.9815-2713A(d); 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(c)(2)(i)(B).[2]

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[2] The fact that the Government has revised the accommodation does not alter Petitioners' religious objection or their entitlement to relief. As noted above, under the revised accommodation, Petitioners must still submit a document that they believe immorally facilitates the delivery of the mandated coverage, and Petitioners must still maintain an objectionable contractual relationship with a third party authorized to deliver such coverage to their plan beneficiaries. Thus, the revised rule continues to force Petitioners to violate their beliefs. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 & n.3 (1993) (stating that regulatory changes do not moot suit where "gravamen of [the] complaint" remains, and new rule "disadvantages [plaintiffs] in the same fundamental way").

B. The Petitioners and Their Health Plans

Petitioners provide a range of spiritual, charitable, educational, and social services to members of their communities, Catholic and non-Catholic alike.

- The Most Reverend David A. Zubik is the Bishop of the Roman Catholic Diocese of Pittsburgh, and is the Trustee of the Roman Catholic Diocese of Pittsburgh, a Charitable Trust. Bishop Zubik also acts as Chairman of the Membership Board of Catholic Charities of the Diocese of Pittsburgh, Inc.
- The Roman Catholic Diocese of Pittsburgh provides pastoral care and spiritual guidance for approximately 700,000 Catholics in Southwestern Pennsylvania, while overseeing spiritual, educational, and social service programs. The Diocese operates a self-insured health plan through the Catholic Benefits Trust and makes its health plan available to the employees of its nonprofit religious affiliates.
- Catholic Charities of the Diocese of Pittsburgh, Inc. serves approximately 81,000 underserved and underprivileged people in Southwestern Pennsylvania by offering a variety of health care and support services. Catholic Charities is insured through the Diocese of Pittsburgh's Catholic Benefits Trust.
- The Most Reverend Lawrence T. Persico is the Bishop of the Roman Catholic Diocese of Erie, and is the Trustee of The Roman Catholic Diocese of Erie, a Charitable Trust. Bishop Persico also acts as Chairman of the Membership Boards of St. Martin Center, Inc.

and Prince of Peace Center, Inc. Bishop Persico also serves on the board of directors of Erie Catholic Preparatory School.

- The Roman Catholic Diocese of Erie provides pastoral care and spiritual guidance for 187,500 Catholics, while serving many Northwestern Pennsylvania residents through schools and charitable programs. The Diocese makes its self-insured health plan available to the employees of its nonprofit religious affiliates.
- St. Martin Center, Inc. is an affiliate nonprofit corporation of the Diocese of Erie, which has been providing individuals and families with resources to gain self-sufficiency for the last fifty years. The Diocese of Erie provides health coverage to St. Martin Center's employees.
- Prince of Peace Center, Inc. is an affiliate nonprofit corporation of the Diocese of Erie, which provides various social and self-sufficiency services to the needy in the greater Mercer County, Pennsylvania community. The Diocese of Erie provides health coverage to Prince of Peace Center's employees.
- Erie Catholic Preparatory School is an affiliate nonprofit corporation of the Diocese of Erie that provides a Christ-centered, college preparatory education to approximately 870 students. The Diocese of Erie provides health coverage to the school's employees.

As entities affiliated with the Catholic Church, Petitioners sincerely believe that life begins at the moment of conception, and that certain "preventive" services that interfere with conception or terminate a

pregnancy are immoral. Pet.App.83a-85a. Petitioners adhere to Catholic doctrines regarding material cooperation with evil and "scandal."[3] Pet.App.76a, 84a. Accordingly, they believe they may not provide, pay for, and/or facilitate access to contraception, sterilization, abortion, or related counseling. *Id.* Among other things, Petitioners' religious beliefs prohibit them from signing a document that authorizes, obligates, designates, or incentivizes their TPA to provide their plan beneficiaries with coverage for abortifacients, contraceptives, and sterilization. Pet.App.84a-85a. Petitioners believe that signing such a document facilitates moral evil and makes them complicit in sin, regardless of whether they are required to pay for the objectionable coverage. Pet.App.84a. Although it takes only a few minutes, signing the self-certification form has "eternal ramifications." Pet.App.84a (quoting testimony of Bishop Persico). The Government stipulated to the sincerity of all of Applicants' articulated religious beliefs. Pet.App.55a n.5, 150a.

Historically, Petitioners have exercised their religious beliefs by offering health coverage in a manner consistent with Catholic teaching. Pet.App.75a-79a. In particular, they have contracted with TPAs that would provide health coverage consistent with their religious beliefs to their plan beneficiaries. Under the Government's regulations,

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[3] "Scandal" involves leading, by words or actions, other persons to engage in wrongdoing. *See* Catechism of the Catholic Church ¶ 2284, *available at* http://www.vatican.va/archive/ENG0015/_P80.HTM.

however, when Petitioners sign and submit the self-certification or notification, the carefully structured provisions of their health plans change: their TPAs for the first time become authorized, obligated, and incentivized to deliver the objectionable coverage to Petitioners' beneficiaries, through Petitioners' health plans.

This affects all of the Petitioners. Despite their religious missions, the non-diocesan Petitioners do not qualify as exempt "religious employers" under the Government's definition. Even the Dioceses, which qualify as "religious employers," are not truly exempt because they offer their health plans to the employees of their non-exempt charitable and educational affiliates. The regulations thus require the Dioceses to facilitate the delivery of the objectionable coverage to enrolled affiliates' employees.

C. The Proceedings Below

To protect their rights of religious exercise, Petitioners filed suit on October 8, 2013, challenging the regulations, including the original "accommodation" as promulgated in July 2013. On November 12 and 13, 2013, the district court held an evidentiary hearing where it admitted 172 joint stipulations, testimony from six witnesses including one Roman Catholic Cardinal and two Bishops, and 64 exhibits, of which the Government proffered only nine unique exhibits. As a result, the well-developed record in this case makes it unique among challenges to the regulations at issue here.

On November 21, 2013, the district court granted a preliminary injunction in favor of Petitioners after making extensive findings of fact and assessments of

witness credibility. The court concluded that the regulations substantially burden Petitioners' sincerely-held religious beliefs under RFRA by requiring them to sign and submit a morally offensive self-certification form under penalty of massive fines that would "gravely impact their spiritual, charitable and educational activities." Pet.App.96a. The court specifically found that Petitioners "have a sincerely-held religious belief that 'shifting responsibility'" to provide contraceptive coverage onto their own TPA "does not absolve or exonerate them from the moral turpitude created by the 'accommodation.'" Pet.App.110a.

The district court further held that the "application of the government's two regulations—one an exemption and one an accommodation—has the effect of dividing the Catholic Church into two separate entities." Pet.App.114a. The court explained that the "religious employer" exemption available to employees who work "inside a church's walls" is not available to the employees of affiliated nonprofits "who stand on the church steps and pass out food and clothes to the needy." Pet.App.114a. "[B]y dividing the Catholic Church in such as manner the Government has created a substantial burden on Plaintiffs' right to freely exercise their religious beliefs." Pet.App.114-15a.

After finding a substantial burden, the district court held that the Mandate, as applied to Petitioners, cannot satisfy RFRA's strict-scrutiny provision. The court noted that the Government asserted only two "'compelling'" interests: (1) "'promotion of public health,'" and (2) "'assuring that women have equal access to health care services.'"

Pet.App.116a. The court held that these interests are "so broadly stated" that they are not "'of the highest order'" such that they "'can overbalance legitimate claims to the free exercise of religion.'" Pet.App.121a (citation omitted). In addition, the court explained that because the Government has granted an exemption for entities it deems "religious employers," it cannot possibly have a "compelling" need to deny a similar exemption for other nonprofit religious organizations: "If there is no compelling governmental interest to apply the contraceptive mandate to the religious employers who operate the 'houses of worship,' then there can be no compelling governmental interest to apply (even in an indirect fashion) the contraceptive mandate to the religious employers of the nonprofit, religious affiliated/related entities." Pet.App.119a.

The court also noted the Government's "fail[ure] to adduce evidence that definitively establishes that it used the least restrictive means to meet the stated compelling government interests." Pet.App.121a. Specifically, the Government failed at the injunction hearing, or in the administrative record, to offer "any evidence" to prove that it utilized the least restrictive means of advancing its asserted interests. Pet.App.122a.

On December 20, 2013, the district court converted its preliminary injunction into a permanent injunction "based on the Government's concession that it would not present additional evidence" on any of the relevant legal elements. Pet.App.132a. Again, the court found that the "Government has not met its burden of demonstrating that it used the least

restrictive means of achieving any compelling governmental interest." Pet.App.132a.

The Government appealed to the Third Circuit. On February 11, 2015, the Third Circuit issued an opinion reversing the district court. Pet.App.1a-49a. The court found no substantial burden on Petitioners' religious exercise because, in the court's view, complying with the "accommodation" by submitting the self-certification form "does not make [Petitioners] 'complicit' in the provision of contraceptive coverage." Pet.App.36a. The court held the regulations impose an "independent obligation" on Petitioners' TPAs to provide the objectionable coverage, and Petitioners' "real objection" is not to any actions they *themselves* are required to take, but only to "what happens after the form is provided." Pet.App.37-38a. Because the court found no substantial burden, it did not reach the issue of strict scrutiny.[4]

Petitioners sought rehearing en banc on March 26, 2015, but the Third Circuit rejected their request on April 6, 2015. Pet.App.137a. Petitioners thereafter filed a motion asking that court to stay its mandate on April 9, 2015, which was denied on April 15. Pet.App.138a. Despite the ordinary rule providing for the court's mandate to issue 7 days after that denial, Fed. R. App. P. 41(b), the Third Circuit ordered the mandate to issue immediately. Pet.App.144a.

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[4] Unlike the district court, the Third Circuit passed on the validity of both the original and the revised "accommodation" under RFRA. *See* Pet.App.15a n.3 ("[W]e also conclude that the alternative compliance mechanism set forth in the August 2014 regulations poses no substantial burden.").

Petitioners then sought emergency relief from Circuit Justice Alito, who entered an order the same day directing the Third Circuit to recall and stay its mandate, thereby leaving the district court's injunction in place pending further order of this Court. Pet.App.148a. The Government submitted its opposition to Petitioners' stay motion on April 20, 2015, and Petitioners filed their reply on April 21.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted under this Court's traditional criteria.

First, the decision below squarely conflicts with this Court's decision in *Hobby Lobby*, which held that the Government substantially burdens religious exercise whenever it forces plaintiffs to "engage in conduct that seriously violates *their* religious beliefs" on pain of "substantial" penalties. 134 S. Ct. at 2775-76 (emphasis added). *Hobby Lobby* made clear that religious believers must decide *for themselves* whether taking a particular action would make them complicit in sin. But the court below ignored that holding, and instead declared that forcing Petitioners to comply with the regulations cannot impose a substantial burden on their religious exercise because it would not *truly* make them "'complicit' in the provision of contraceptive coverage." Pet.App.36a. As at least five different circuit judges have recognized, that analysis is clearly inappropriate and contrary to this Court's precedent because it involves impermissible second-guessing of private religious beliefs. *See Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-5368, 2015 U.S. App. LEXIS 8326, at *30 (D.C. Cir. May 20, 2015) (Brown, J., dissenting, joined by Henderson, J.)

("Plaintiffs, including an Archbishop and two Catholic institutions of higher learning, say compliance with the regulations would facilitate access to contraception in violation of the teachings of the Catholic Church[, and no] law or precedent grants [any court] authority to conduct an independent inquiry into the correctness of this belief[.]"); *id.* at *49-52 (Kavanaugh, J., dissenting) (same); *Univ. of Notre Dame v. Burwell*, No. 13-3853, 2015 U.S. App. LEXIS 8234, at *59-60 (7th Cir. May 19, 2015) (Flaum, J., dissenting) (same); *Eternal Word Television Network, Inc. v. HHS*, 756 F.3d 1339 (11th Cir. 2014) ("*EWTN*") (Pryor, J., concurring) (same).

Second, the decision below added to the growing confusion and division among the circuits over the proper way to conduct RFRA's substantial-burden inquiry. The court below held, in agreement with the D.C. Circuit, that forcing religious adherents to act contrary to their religious beliefs does not substantially burden their religious exercise if a court determines that the required actions do not, in its opinion, *really* facilitate wrongdoing. By contrast, the Seventh, Tenth, and Eleventh Circuits have held that courts must defer to a plaintiff's sincere religious belief that taking a particular act is objectionable because it would facilitate wrongdoing. These circuits focus on *coercion*, recognizing that the Government substantially burdens religious exercise whenever it imposes substantial pressure on religious adherents to violate *their* beliefs, including by taking any action that *they believe* would make them complicit in sin. This Court's intervention is needed to resolve this fundamental disagreement among the circuits.

Third, the issue presented here is exceptionally important because it implicates core protections of religious liberty. The outcome of this case will affect thousands of religious nonprofits around the country, which hope to avoid being put to the agonizing choice between violating their religious beliefs or incurring ruinous penalties.

I. THE DECISION BELOW CONFLICTS WITH *HOBBY LOBBY* AND THIS COURT'S OTHER PRECEDENT

RFRA prohibits the Government from imposing a "substantial burden" on religious exercise unless doing so "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1. The panel's conclusion that the challenged regulations do not impose a substantial burden on Petitioners' religious exercise squarely conflicts with this Court's precedent.

Under *Hobby Lobby*, the test for a "substantial burden" on religious exercise is whether the Government imposes substantial pressure on religious adherents to take (or forgo) *any* action contrary to their sincere religious beliefs. That test is met when the Government "demands that [plaintiffs] engage in conduct that seriously violates their religious beliefs" or else suffer "substantial economic consequences." 134 S. Ct. at 2775-76; *see also Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (concluding that the petitioner "easily satisfied" the substantial-burden standard where he was "put to the choice" of violating his religious beliefs or suffering "serious disciplinary action"); *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981) (defining "substantial burden" on religious exercise

as "substantial pressure on an adherent to modify his behavior and to violate his beliefs"); *Notre Dame*, 2015 U.S. App. LEXIS 8234, at *60 n.1 (Flaum, J., dissenting) ("*Hobby Lobby* instructs that substantiality is measured by the severity of the penalties for non-compliance.").

Applying that test here leaves no doubt that the regulations substantially burden Petitioners' religious exercise. Just as in *Hobby Lobby*, Petitioners believe that if they "comply with the [regulations]" "they will be facilitating" immoral conduct in violation of their religion. 134 S. Ct. at 2759. And just as in *Hobby Lobby*, if Petitioners "do not comply" "they will pay a very heavy price." *Id.* In short, because the Government "forces [Petitioners] to pay an enormous sum of money if they insist on providing insurance coverage in accordance with their religious beliefs, [it has] clearly impose[d] a substantial burden" on their religious exercise. *Id.* at 2779.

Rather than applying this test, the court below undertook what it called an "objective evaluation" to "assess whether [Petitioners'] compliance with the self-certification procedure does, in fact, trigger, facilitate, or make them complicit in the provision of contraceptive coverage." Pet.App.29a. As part of that "objective" analysis, the court stated that it would "consider the nature of the action required of the [Petitioners], the connection between that action and the [Petitioners'] beliefs, and the extent to which that action interferes with or otherwise affects the [Petitioners'] exercise of religion." Pet.App.31a. After conducting that inquiry, the court concluded that "the submission of the self-certification form does not

make [Petitioners] 'complicit' in the provision of contraceptive coverage," and indeed "relieves [Petitioners] of any connection" to the objectionable coverage. Pet.App.36a, 44a.

That analysis cannot be reconciled with *Hobby Lobby*, which explained that whether a particular action makes a plaintiff complicit in sin is "a difficult and important question of religion and moral philosophy." 134 S. Ct. at 2778. Contrary to the panel's analysis, RFRA allows religious plaintiffs, not courts, to determine whether a particular act is "connected to" wrongdoing "in a way that is sufficient to make it immoral." *Id.* Courts may not "[a]rrogat[e] the authority to provide a binding national answer to [that] religious and philosophical question." *Id.* But that is exactly what the lower court did: by proclaiming that complying with the "accommodation" would not make Petitioners complicit in sin, the court substituted its own moral judgment for that of Petitioners, effectively telling a Roman Catholic Cardinal and two Bishops "that their beliefs are flawed." *Id.*

In addition to applying the wrong legal test, the court below also departed from *Hobby Lobby* and this Court's other precedent in at least four discrete ways.

First, the court asserted that this case is unlike *Hobby Lobby* because the "accommodation" does not force Petitioners to choose between providing contraceptive coverage or paying a penalty, but instead gives them a "third option" of complying with the "accommodation." Pet.App.33a. But that distinction is irrelevant because Petitioners likewise object, based on sincerely held religious beliefs, to

taking the actions required under the "accommodation"—namely, submitting the required documentation and maintaining the required contractual relationship. True, the "accommodation provides an alternative, but the alternative itself imposes a substantial burden on the religious organization's exercise of religion." *Priests for Life*, 2015 U.S. App. LEXIS 8326, at *60 (Kavanaugh, J., dissenting). This Court's precedent makes clear that RFRA protects "'*any* exercise of religion,'" which includes "the performance of (or abstention from) physical acts" that are "engaged in for religious reasons." *Hobby Lobby*, 134 S. Ct. at 2762, 2770 (emphasis added). Once a plaintiff "dr[a]w[s] a line" as to which actions are religiously objectionable, "it is not for [courts] to say that the line he drew was an unreasonable one." *Thomas*, 450 U.S. at 715. It makes no difference whether the religious exercise at issue is refraining from shaving one's beard (*Holt*), refraining from paying for abortifacient and contraceptive coverage (*Hobby Lobby*), or refraining from submitting an objectionable form and maintaining an objectionable contractual relationship (here). *See Priests for Life*, 2015 U.S. App. LEXIS 8326, at *60-61 (Kavanaugh, J., dissenting) (explaining that being forced to comply with the accommodation is no different than being forced to "shav[e] your beard," "send[] your children to high school," "pay[] the Social Security tax," or "work[] on the Sabbath").

Second, *Hobby Lobby* also forecloses the lower court's attempt to recast Petitioners' religious objection as an objection to the conduct of third parties. *See* Pet.App.37a-40a (citing *Bowen v. Roy*, 476 U.S. 693 (1986); *Lyng v. Nw. Indian Cemetery*

Protective Ass'n, 485 U.S. 439 (1988)). Contrary to the lower court's characterization, Petitioners' "real objection" is not to the actions of "the insurance issuers and the third-party administrators." Pet.App.37a. Rather, the undisputed record reveals that Petitioners object to acts that they *themselves* are compelled to take, namely: (1) signing and submitting the required self-certification or notification, and (2) maintaining the objectionable contractual relationship. "Make no mistake: the harm Plaintiffs complain of" is "their inability to conform *their own* actions and inactions to their religious beliefs without facing massive penalties from the government." *Priests for Life*, 2015 U.S. App. LEXIS 8326, at *22 (Brown, J., dissenting). The regulations thus plainly interfere with "the ability *of* [*Petitioners themselves*] to conduct [their operations] in accordance with their religious beliefs." *Hobby Lobby*, 134 S. Ct. at 2778 (emphasis added).

Hobby Lobby rejected a similar attempt to transform the plaintiffs' religious objection into an objection to the actions of third parties. "There, as here, [the Government's] main argument was 'basically that the connection between what the objecting parties must do . . . and the end that they find to be morally wrong was simply too attenuated." *Notre Dame*, 2015 U.S. App. LEXIS 8234, at *59 (Flaum, J., dissenting (quoting *Hobby Lobby*, 134 S. Ct. at 2777)). In other words, the Government argued that the plaintiffs had no cognizable claim under RFRA because "the ultimate event" to which they objected—"the destruction of an embryo"—would come about only as a result of independent actions taken by others. 134 S. Ct. at 2777 & n.33. This Court rightly noted that the Government's argument

"dodge[d] the question that RFRA presents" because it refused to acknowledge the plaintiffs' religious objections was based on their perceived moral duty to avoid "enabling or facilitating the commission of an immoral act by another." *Id.* at 2778. The same is true here. *See Notre Dame*, 2015 U.S. App. LEXIS 8234, at *60 (Flaum, J., dissenting); *Priests for Life*, 2015 U.S. App. LEXIS 8326, at *29-35 (Brown, J., dissenting); *id.* at *48-62 (Kavanaugh, J., dissenting).

Third, the court below concluded that there can be no substantial burden because Petitioners' TPAs have an "independent obligation" to provide abortifacient and contraceptive coverage to Petitioners' plan beneficiaries. Pet.App.38a. But *Hobby Lobby* shows that conclusion to be both irrelevant and wrong. It is irrelevant because Petitioners cannot be forced to maintain a contractual relationship with any company obligated, authorized, or incentivized to provide abortifacient and contraceptive coverage to their plan beneficiaries, regardless of whether the company has an "independent obligation" to do so. *Cf. Notre Dame*, 2015 U.S. App. LEXIS 8234, at *59-60 (Flaum, J., dissenting) (stating that whether the regulations impose an "independent" obligation "really is of no moment here, because Notre Dame also believes that being driven into an ongoing contractual relationship with an insurer that provides its students with contraception compels it to act in contravention of its beliefs").

In any event, the lower court's analysis is plainly wrong because the "obligation" imposed on Petitioners' TPAs to provide abortifacient and

contraceptive coverage to Petitioners' plan beneficiaries is not "independent" of Petitioners. Instead, Petitioners' TPAs have that obligation only "so long as [the beneficiaries] are enrolled in [the] health plan" that Petitioners are forced to offer them, 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(c)(2)(i)(B), and only so long as Petitioners submit the required notification or form, *see supra* 7-10; *see also Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2814 n.6 (2014) (Sotomayor, J., dissenting) (stating that the TPA of a religious objector "bears the legal obligation to provide contraceptive coverage *only upon* receipt of a valid self-certification." (emphasis added)).[5] Consequently, the regulations coerce Petitioners into serving as the crucial link between contraceptive providers and recipients.

Indeed, this Court need look no further than the Government's own arguments to confirm Petitioners' integral role in the regulatory scheme. If TPAs truly had an "independent" obligation to provide abortifacient and contraceptive coverage to Petitioners' employees, then the Government could not plausibly claim that granting an exemption for Petitioners "would deprive hundreds of employees" of abortifacient and contraceptive coverage. Opp'n at

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[5] The Government itself has *conceded* that "[w]ithout the self-certification form, the TPA is prohibited from providing coverage for the objectionable services to [the Affiliates'] employees." Pet.App.150a, 153a. The same is true under the "notification" option, because the notification has the same effect of authorizing, obligating, and incentivizing the objecting organization's TPA to provide the objectionable coverage. *See* 26 C.F.R. § 54.9815-2713AT(b)(1)(ii)(B), (c)(1)(ii).

36, *Wheaton*, 134 S. Ct. 2806 (U.S. July 2014) (No. 13A1284). And if the regulatory scheme were in fact "totally disconnected" from Petitioners' actions, Pet.App.44a, then it is impossible to see how the Government could claim a "compelling interest" in forcing Petitioners to take any action to comply with the regulations. "After all, if the form were meaningless why would the government require it?" *Priests for Life*, 2015 U.S. App. LEXIS 8326, at *58 (Kavanaugh, J., dissenting).

Finally, the court below ignored the fact that the regulations split the Catholic church into an exempt "worship" wing and a non-exempt "charitable and educational" wing. As the district court recognized, Petitioners "sincerely believe that religious worship, faith, and good works are essential and integral components of the Catholic faith and constitute the core mission of the Catholic Church." Pet. App.64a. But while the regulations allow the Bishops to act consistently with their beliefs on behalf of exempt "worship" entities, they require the Bishops to violate their religious beliefs when acting on behalf their equally religious charitable and educational affiliates, which are subject to the requirements of the "accommodation." The regulatory scheme thus penalizes the Catholic Church for venturing beyond the walls of a "church" and exercising its religion through charitable and educational services that are at the very heart of its faith and religious mission.

II. THE CIRCUITS ARE DIVIDED OVER THE ISSUES PRESENTED

A. The Circuits Are Divided on How to Apply RFRA's "Substantial Burden" Test

As this Court has acknowledged, the "Circuit Courts have divided on whether to enjoin" the accommodation for "religious nonprofit organizations," and "[s]uch division is a traditional ground for certiorari." *Wheaton*, 134 S. Ct. at 2807 (citing Sup. Ct. R. 10(a)). This division is based on a fundamental disagreement about the proper test for a "substantial burden" under RFRA.

The D.C. Circuit has agreed with the Third Circuit's decision below that forcing religious adherents to act in violation of their sincere religious beliefs is not a substantial burden on religious exercise if a court determines that the required actions are insubstantial or do not truly make the believer complicit in wrongdoing. In stark contrast, the Seventh, Tenth, and Eleventh Circuits have properly focused on the substantiality of the *pressure* placed on religious adherents to act in violation of their beliefs, while deferring to the adherent's religious understanding that a particular action would make him complicit in sin. In these latter circuits, the nature of the compelled action is irrelevant to the substantial-burden analysis, as long as the plaintiff sincerely believes the compelled action is religiously objectionable.

1. In *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), *aff'd*, 134 S. Ct. 2751, the Tenth Circuit held that the substantial-burden test does not allow "an inquiry into the theological merit of the [religious objection] in question," but instead turns solely on "the *intensity of the coercion* applied by the government to act contrary to [sincere religious] beliefs." *Id.* at 1137. Thus, when a plaintiff brings a RFRA claim in the

Tenth Circuit, the court's "only task" in applying the substantial-burden test "is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief." *Id.* Crucially, the Tenth Circuit has emphasized that religious believers *themselves* must determine whether a particular act is religiously objectionable on the ground that it would facilitate wrongdoing and thus make them complicit in sin. *Id.* at 1142 ("[T]he question here is not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity.").

In *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013), the Seventh Circuit expressly "agree[d] with the Tenth Circuit that the substantial-burden test under RFRA focuses primarily on the 'intensity of the coercion applied by the government to act contrary to religious beliefs.'" *Id.* at 683 (quoting *Hobby Lobby*, 723 F.3d at 1137). Thus, in the Seventh Circuit, "the substantial-burden inquiry evaluates the coercive effect of the governmental pressure on the adherent's religious practice and steers well clear of deciding religious questions." *Id.* Like the Tenth Circuit, the Seventh Circuit emphasized that where plaintiffs have a religious objection to taking a particular action because *they* believe it would make them "complicit in a grave moral wrong," courts may not second-guess that religious judgment. *Id.* Accordingly, the test for a substantial burden in the Seventh Circuit is whether the Government has "placed [sufficient] pressure on the plaintiffs to

violate their religious beliefs and conform to its regulatory mandate." *Id.* [6]

The Eleventh Circuit has adopted the same test laid out in *Korte*, and has issued an injunction pending appeal against the nonprofit "accommodation." *See EWTN*, 756 F.3d 1339. The injunction in *EWTN* was based on the Eleventh Circuit's rule that the Government substantially burdens religious exercise whenever it requires a "religious adherent" to "'participat[e] in an activity prohibited by religion,'" by imposing "significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." *Id.* at 1345 (Pryor, J., concurring) (quoting *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004)). Whether an action is religiously objectionable because it makes the actor "complicit in a grave moral wrong" cannot be second-guessed by courts, but must be left up to the judgment of individual religious believers. *Id.* at 1348 (citing

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[6] The Seventh Circuit's substantial-burden test as set forth in *Korte* was not displaced by its subsequent 2-1 decision in *Notre Dame*, No. 13-3853, 2015 U.S. App. LEXIS 8234, issued after this Court vacated and remanded the original *Notre Dame* decision for reconsideration in light of *Hobby Lobby*. On remand, the court declined to grant a preliminary injunction to Notre Dame. *Id.* at *15, *35. Under applicable Seventh Circuit precedent, "findings of fact and conclusions of law made at the preliminary injunction stage" are "not binding," in recognition of the fact that they are "often based on incomplete evidence and a hurried consideration of the issues." *Thomas & Betts Corp. v. Panduit Corp.*, 138 F.3d 277, 292-93 (7th Cir. 1998). Consequently, *Korte* remains good law in the Seventh Circuit.

Hobby Lobby, 134 S. Ct. at 2778). Judge Pryor openly acknowledged that other circuits have recently applied a contrary rule to uphold the accommodation, but he dismissed that rule as "[r]ubbish." *Id.* at 1347

2. In sharp contrast, the D.C. Circuit, like the Third Circuit below, has held that courts may second-guess a claimant's sincere religious belief that taking a particular action would make him complicit in sin, and has further indicated that courts should assess whether the *actions* RFRA claimants are required to take are truly "substantial" in nature.

In *Priests for Life*, the D.C. Circuit concluded that the "accommodation" did not substantially burden plaintiffs' religious exercise because it does not require plaintiffs to take any substantial action, and because complying with the accommodation would not truly make them complicit in wrongdoing. Far from focusing on "the *intensity of the coercion*" as required by the Tenth, Seventh, and Eleventh Circuits, *Hobby Lobby*, 723 F.3d at 1137, the court stated that the "requirement that [plaintiffs file] a sheet of paper" "is not a burden that any precedent allows us to characterize as substantial." *Priests for Life v. U.S. Dep't Health & Human Servs.* 772 F.3d. 229, 256 (D.C. Cir. 2014). The court also refused to accept the plaintiffs' religious belief that complying with the accommodation would make them complicit in sin, and instead concluded that such action would "[n]ot [f]acilitate [c]ontraceptive coverage" because it would render them completely "dissociated from the provision of contraceptive services." *Id.* at 253. That pronouncement squarely contradicts the approach of the Tenth, Seventh, and Eleventh

Circuits, which have properly held that whether an action impermissibly "facilitates" wrongdoing (and thus makes the actor complicit in sin) is a *religious* judgment that courts may not second-guess. *See Hobby Lobby*, 723 F.3d at 1142; *Korte*, 723 F.3d at 1137; *EWTN*, 756 F.3d at 1348.

3. The fact that the Seventh Circuit's decision in *Korte* and the Tenth Circuit's decision in *Hobby Lobby* involved regulations applicable to for-profit entities does not diminish the conflict among the circuits. That conflict arises from the fact that different appellate courts have applied different legal tests to determine whether a regulation imposes a substantial burden on religious exercise. As detailed above, the substantial-burden test applied by the Seventh, Tenth, and Eleventh Circuits evaluates only "the *intensity of the coercion* applied by the government to act contrary to [sincere religious] beliefs." 723 F.3d at 1137. In stark contrast, the test applied below, as well as in the D.C. Circuit, attempts to independently assess the nature of the required action, and to ascertain whether compliance *truly* makes the religious objector "complicit" in sin. Pet.App.36a. The split in authority is thus squarely presented and in need of resolution.

B. The Circuits Are Divided on Whether the Regulations Satisfy Strict Scrutiny

The circuits are also divided regarding whether the regulations at issue can satisfy strict scrutiny. Although the Third Circuit did not reach this issue, the matter was fully briefed in the district court, where the Government conceded that it had presented the entirety of its evidence. Pet.App.132a.

Accordingly, this case would be an appropriate vehicle to resolve the existing split.

In *Korte*, the Seventh Circuit held that the Government could use several less-restrictive means to provide free abortifacient and contraceptive coverage without using the health plans of religious objectors as a conduit. "The government can provide a 'public option' for contraception insurance; it can give tax incentives to contraception suppliers to provide these medications and services at no cost to consumers; it can give tax incentives to consumers of contraception and sterilization services. No doubt there are other options." *Korte*, 735 F.3d at 686; *see also Notre Dame*, 2015 U.S. App. LEXIS 8234, at *65-66 (Flaum, J., dissenting) (noting in a nonprofit case that *Korte*'s strict-scrutiny analysis "remains the law of [the Seventh] circuit," such that the Government "conceded that *Korte* dictates the issuance of a preliminary injunction if the court finds a substantial burden"). In contrast, the D.C. Circuit ruled out these alternatives in *Priests for Life*, claiming that they would "make the coverage no longer seamless from the beneficiaries' perspective, instead requiring them to take additional steps to obtain contraceptive coverage elsewhere." 772 F.3d at 245, 264-67.

Likewise, the Tenth Circuit's en banc decision in *Hobby Lobby* held that the Government's goal of providing free contraceptive coverage cannot qualify as a "compelling" interest "because the contraceptive-coverage requirement presently does not apply to tens of millions of people" under its various exemptions. 723 F.3d at 1143. The Tenth Circuit reasoned that the regulations "'cannot be regarded as

protecting an interest of the highest order when [they] leave[] appreciable damage to that supposedly vital interest unprohibited.'" *Id.* (quoting *O Centro*, 546 U.S. at 547). In contrast, the D.C. Circuit held that "[t]he government's interest in a comprehensive, broadly available system is not undercut by the other exemptions in the ACA, such as the exemptions for religious employers, small employers, and grandfathered plans." 772 F.3d at 245, 266.

Again, although *Korte* and *Hobby Lobby* involved for-profit regulations, they nonetheless conflict squarely with the D.C. Circuit's strict-scrutiny analysis. The Seventh Circuit in *Korte* identified several "less restrictive" ways of providing abortifacient and contraceptive coverage that would also be less restrictive here, because they would require *no action* from nonprofit religious objectors. And the Tenth Circuit's analysis in *Hobby Lobby* equally shows why the Government lacks a "compelling" interest here, in light of the numerous other exemptions the Government has already granted from the "accommodation." The law of the Seventh and Tenth Circuits is thus flatly contrary to the decision of the D.C. Circuit in both reasoning and result.

III. THIS CASE IS EXCEPTIONALLY IMPORTANT

Certiorari is warranted for the independent reason that the court below has "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). The question of federal law presented here affects the rights of untold thousands of nonprofit religious groups who are subject to the Government's

regulatory scheme. Application of the regulations and massive fines not only affects Petitioners' rights, but also would negatively impact Petitioners' ability to provide food, shelter, education, and other basic services to the needy in the communities Petitioners serve. Aside from the instant case, there are at least 40 other cases pending in the lower courts challenging the accommodation, and courts have granted injunctions in 29 of those cases.[7]

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[7] *See, e.g.*, *Wheaton Coll.*, 134 S. Ct. 2806; *Little Sisters of the Poor v. Sebelius*, 134 S. Ct. 1022 (2014); *Ass'n of Christian Schs. Int'l v. Burwell*, No. 14-1492 (10th Cir. Dec. 19, 2014) (Doc. 14); *Catholic Charities Archdiocese of Phila. v. HHS*, No. 14-3126 (3d Cir. Sept. 2, 2014); *EWTN*, 756 F.3d 1339; *Diocese of Cheyenne v. Burwell*, No. 14-8040 (10th Cir. June 30, 2014) (Doc. 27); *Insight for Living Ministries v. Burwell*, No. 14-cv-00675, 2014 U.S. Dist. LEXIS 165228 (E.D. Tex. Nov. 25, 2014); *Ave Maria Univ. v. Burwell*, No. 2:13-cv-630, 2014 WL 5471048 (M.D. Fla. Oct. 28, 2014); *Ave Maria Sch. of Law v. Burwell*, No. 2:13-cv-795, 2014 WL 5471054 (M.D. Fla. Oct 28, 2014); *La. College v. Sebelius*, No. 12-0463, 2014 U.S. Dist. LEXIS 113083 (W.D. La. Aug. 13, 2014); *Archdiocese of St. Louis v. Burwell*, 28 F. Supp. 3d 944 (E.D. Mo. 2014); *Brandt v. Burwell*, No. 14-CV-0681, 2014 WL 2808910 (W.D. Pa. June 20, 2014); *Colo. Christian Univ. v. Sebelius*, 51 F. Supp. 3d 1052 (D. Colo. 2014); *Catholic Benefits Ass'n v. Sebelius*, 24 F. Supp. 3d 1094 (W.D. Okla. 2014); *Dordt Coll. v. Sebelius*, 22 F. Supp. 3d 934 (N.D. Iowa2014); *FOCUS v. Sebelius*, No. 1:13-cv-03263 (D. Colo. Apr. 23, 2014) (Docs. 39, 40); *Dobson v. Sebelius*, 38 F. Supp. 3d 1245 (D. Colo. 2014); *Roman Catholic Archdiocese of Atl. v. Sebelius*, No. 1:12-CV-03489, 2014 WL 1256373 (N.D. Ga. Mar. 26, 2014); *Ave Maria Found. v. Sebelius*, 991 F. Supp. 2d 957 (E.D. Mich. 2014); *Catholic Diocese of Beaumont v. Sebelius*, 10 F. Supp.

Indeed, there can be little doubt that the core question of religious liberty at issue in this case is "exceptionally important." *Priests for Life*, 2015 U.S. App. LEXIS 8326, at *20 (Brown, J., dissenting). This Court has already recognized the importance of this issue by granting extraordinary relief to every entity that has requested it under the All Writs Act. *See Wheaton*, 134 S. Ct. 2806; *Little Sisters of the Poor v. Sebelius*, 134 S. Ct. 1022 (2014). Moreover, it has twice granted, vacated, and remanded pre-*Hobby Lobby* appellate decisions upholding the accommodation, indicating a "reasonable probability that th[ose] decision[s] rest[] upon a premise" that should be "reject[ed]" in light of subsequent authority. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam); *Univ. of Notre Dame v. Burwell*, 135 S. Ct. 1528 (2015); *Mich. Catholic Conf. v. Burwell*, 135 S. Ct. 1914 (2015). Notably, those two now-vacated decisions undergirded much of the

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(continued...)

3d 725 (E.D. Tex. 2014); *Roman Catholic Diocese of Fort Worth v. Sebelius*, No. 4:12-cv-314 (N.D. Tex. Dec. 31, 2013) (Doc. 99); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12 cv-92, 2013 WL 6858588 (E.D. Mo. Dec. 30, 2013); *Diocese of Fort Wayne-S. Bend v. Sebelius*, 988 F. Supp. 2d 958 (N.D. Ind. 2013); *Grace Schs. v. Sebelius*, 988 F. Supp. 2d 935 (N.D. Ind. 2013); *E. Tex. Baptist Univ. v. Sebelius*, 988 F. Supp. 2d 743 (S.D. Tex. 2013); *S. Nazarene Univ. v. Sebelius*, No. Civ-13-1015-F, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013); *Reaching Souls Int'l, Inc. v. Sebelius*, No. 13-1092, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013); *Legatus v. Sebelius*, 988 F. Supp. 2d 794 (E.D. Mich. 2013); *Roman Catholic Archdiocese of N.Y. v. Sebelius*, 987 F. Supp. 2d 232 (E.D.N.Y. 2013).

panel's reasoning in the case at hand. Pet.App.29a-30a, 34a-37a, 42a-43a, 46a. (invoking repeatedly the reasoning of *MCC* and *Notre Dame*).

Finally, certiorari is warranted because "the court of appeals based its decision upon a point expressly reserved or left undecided in prior Supreme Court opinions." Shapiro, et al., Supreme Court Practice § 4.5, at 254 (10th ed. 2013) (citing cases). *Hobby Lobby* expressly reserved the issue presented in this case, 134 S. Ct. at 2782 & n.40, and it is now ripe for resolution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 29, 2015

APPENDIX

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 13-3536, 14-1374, 14-1376, 14-1377

GENEVA COLLEGE; WAYNE HEPLER; THE SENECA HARDWOOD LUMBER COMPANY, INC., a Pennsylvania Corporation; WLH ENTERPRISES, a Pennsylvania Sole Proprietorship of Wayne L. Hepler; CARRIE E. KOLESAR

v.

SECRETARY UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY UNITED STATES DEPARTMENT OF LABOR; SECRETARY UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY,

Appellants in case no. 13-3536

GENEVA COLLEGE; WAYNE L. HEPLER, in his personal capacity and as owner and operator of the sole proprietorship WLH Enterprises; THE SENECA HARDWOOD LUMBER COMPANY, INC., a Pennsylvania Corporation; CARRIE E. KOLESAR

v.

SECRETARY UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY UNITED STATES DEPARTMENT OF LABOR; SECRETARY UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY,

Appellants in case no. 14-1374

MOST REVEREND LAWRENCE T. PERSICO, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF ERIE, AS TRUSTEE OF THE ROMAN CATHOLIC DIOCESE OF ERIE, A CHARITABLE TRUST; THE ROMAN CATHOLIC DIOCESE OF ERIE; ST. MARTIN CENTER, INC., AN AFFILIATE NONPROFIT CORPORATION OF CATHOLIC CHARITIES OF THE DIOCESE OF ERIE; PRINCE OF PEACE CENTER, INC., AN AFFILIATE NONPROFIT CORPORATION OF CATHOLIC CHARITIES OF THE DIOCESE OF ERIE; ERIE CATHOLIC PREPARATORY SCHOOL, AN AFFILIATE NONPROFIT CORPORATION OF THE ROMAN CATHOLIC DIOCESE OF ERIE

v.

SECRETARY OF UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY OF UNITED STATES DEPARTMENT OF LABOR; SECRETARY OF UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF HEALTH AND

HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY,

Appellants in case no. 14-1376

MOST REVEREND DAVID A. ZUBIK, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF PITTSBURGH, as Trustee of the Roman Catholic Diocese of Pittsburgh, a Charitable Trust; THE ROMAN CATHOLIC DIOCESE OF PITTSBURGH, as the Beneficial Owner of the Pittsburgh series of The Catholic Benefits Trust; CATHOLIC CHARITIES OF THE DIOCESE OF PITTSBURGH, INC., an affiliate nonprofit corporation of The Roman Catholic Diocese of Pittsburgh

v.

SECRETARY OF UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY OF UNITED STATES DEPARTMENT OF LABOR; SECRETARY OF UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY,

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Appellants in case no. 14-1377

On Appeal from the United States District Court for the Western District of Pennsylvania

(District Court Nos.: 1-13-cv-00303; 2-12-cv-00207 and 2-13-cv-01459)

District Judges: Honorable Joy Flowers Conti; Honorable Arthur J. Schwab

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Argued on November 19, 2014

Before: McKEE, *Chief Judge*, RENDELL, SLOVITER, *Circuit Judges*

(Opinion filed: February 11, 2015)

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Christian Legal Society in Support of Appellees and Urging Affirmance

OPINION

RENDELL, *Circuit Judge*:

The appellees in these consolidated appeals challenge the preventive services requirements of the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § § 2000bb to 2000bb-4. Particularly, the appellees object to the ACA's requirement that contraceptive coverage be provided to their plan participants and beneficiaries. However, the nonprofit appellees are eligible for an accommodation to the contraceptive coverage requirement, whereby once they advise that they will not pay for the contraceptive services, coverage for those services will be independently provided by an insurance issuer or third-party administrator. The appellees urge that the accommodation violates RFRA because it forces them to "facilitate" or "trigger" the provision of insurance coverage for contraceptive services, which they oppose on religious grounds. The appellees affiliated with the Catholic Church also object on the basis that the application of the accommodation to Catholic nonprofit organizations has the impermissible effect of dividing the Catholic Church, because the Dioceses themselves are eligible for an actual exemption from the contraceptive coverage requirement. The District Courts granted the appellees' motions for a preliminary injunction, and, in one of the cases, converted the preliminary injunction to a permanent injunction. Because we disagree with the District Courts and conclude that the accommodation places no substantial burden on the appellees, we will reverse.

I. BACKGROUND

A. Statutory and Regulatory Background

1. The Affordable Care Act, the Preventive Services Coverage Requirement, and the Accommodation for Religious Nonprofit Organizations

In 2010, Congress passed the ACA, which requires group health plans and health insurance issuers offering health insurance coverage[1] to cover preventive care and screenings for women, without cost sharing (such as a copayment, coinsurance, or a deductible), as provided for in guidelines established by the Department of Health and Human Services ("HHS"). 42 U.S.C. § 300gg-13(a)(4).[2] HHS requested assistance from the Institute of Medicine ("IOM"), a nonprofit arm of the National Academy of Sciences, to develop guidelines regarding which preventive

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[1] Eligible organizations may be either "insured" or "self-insured." An employer has an "insured" plan if it contracts with an insurance company to bear the financial risk of paying its employees' health insurance claims. An employer has a "self-insured" plan if it bears the financial risk of paying its employees' claims. Many self-insured employers use third-party administrators to administer their plans and process claims. *See* Cong. Budget Office, Key Issues in Analyzing Major Health Insurance Proposals 6 (2008). The appellees here fall into both categories.

[2] The ACA's preventive care requirements apply only to non-grandfathered group health plans and health insurance issuers offering non-grandfathered health insurance coverage. *See* 45 C.F.R. § 147.140 (exempting "grandfathered" plans— "coverage provided by a group health plan, or a group or individual health insurance issuer, in which an individual was enrolled as of March 23, 2010," the date on which the ACA was enacted "for as long as it maintains that status under the rules of this section").

services for women should be required. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; and 45 C.F.R. pt. 147). The IOM issued a report recommending a list of preventive care services, including all contraceptive methods approved by the Food and Drug Administration ("FDA"). The regulatory guidelines accordingly included "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity," as prescribed by a health care provider. 77 Fed. Reg. at 8725 (alteration in original). The relevant regulations require coverage of the contraceptive services recommended in the guidelines. *See* 26 C.F.R. § 54.9815-2713(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv), 45 C.F.R. § 147.130(a)(1)(iv).

The implementing regulations authorize an exemption from contraceptive coverage for the group health plan of a "religious employer." 45 C.F.R. § 147.131(a). The regulations define a religious employer as a nonprofit organization described in the Internal Revenue Code provision referring to churches, their integrated auxiliaries, and conventions or associations of churches, and the exclusively religious activities of any religious order. *Id.* (citing 26 U.S.C. § 6033(a)(3)(A)(i), (iii)).

After notice-and-comment rulemaking, the Department of the Treasury, the Department of Labor, and the Department of Health and Human Services (the "Departments") published final

regulations in July 2013 that provided relief for organizations that, while not "religious employers," nonetheless oppose coverage on account of their religious objections. These regulations include an "accommodation" for group health plans established or maintained by "eligible organizations" (and group health coverage provided in connection with such plans). *See* 26 C.F.R. § 54.9815-2713A(a), 29 C.F.R. § 2590-2713A(a), 45 C.F.R. § 147.131(b); Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870 (July 2, 2013) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pts. 2510 & 2590; and 45 C.F.R. pts. 147 & 156). An "eligible organization" means a nonprofit organization that "holds itself out as a religious organization" and "opposes providing coverage for some or all of any contraceptive services required to be covered on account of religious objections." 45 C.F.R. § 147.131(b). To invoke this accommodation, an employer must certify that it is such an organization. *Id.* § 147.131(b)(4). Here, there is no dispute that the nonprofit religious organization appellees are eligible organizations under these regulations.

To take advantage of the accommodation to the contraceptive coverage requirement, the eligible organization must complete the self-certification form, EBSA Form 700, issued by the Department of Labor's Employee Benefits Security Administration, indicating that it has a religious objection to providing coverage for the required contraceptive services. The eligible organization then is to provide a

copy of the form to its insurance issuer or third-party administrator. 78 Fed. Reg. at 39,875.[3]

The submission of the form has no real effect on the plan participants and beneficiaries. They still have access to contraception, without cost sharing, through alternate mechanisms in the regulations.[4]

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[3] After these suits had been filed, the Supreme Court granted an injunction pending appeal in *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), and ordered that the eligible organization applicant need not use EBSA Form 700 to notify its insurance issuer or third-party administrator of its religious objection to the contraceptive coverage requirement; instead, if the organization notifies the government in writing of its objection, the government is enjoined from enforcing the contraceptive coverage requirement against the organization. *Id.* at 2807. In response, interim final regulations were issued in August 2014 allowing an eligible organization to opt out by notifying HHS directly, rather than notifying its insurance issuer or third-party administrator; the eligible organization also need not use EBSA Form 700. Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092 (Aug. 27, 2014) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pts. 2510 & 2590; and 45 C.F.R. pt. 147); *see also* 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B), (c)(1)(ii); 45 C.F.R. § 147.131(c)(1)(ii). We conclude here that the accommodation, even when utilizing EBSA Form 700, poses no substantial burden. To the extent that the Supreme Court's order in *Wheaton* may be read to signal that the alternative notification procedure is less burdensome than using EBSA Form 700, we also conclude that the alternative compliance mechanism set forth in the August 2014 regulations poses no substantial burden.

[4] The Supreme Court has recognized that the accommodation ensures that employees of entities with religious objections have the same access to all FDA-approved contraceptives as employees of entities without religious objections to providing such coverage. "The effect of the HHS-created accommodation on the women employed would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-

Under these regulations, an eligible organization is not required "to contract, arrange, pay, or refer for contraceptive coverage" to which it objects on religious grounds. 78 Fed. Reg. at 39,874. As a result, either the health insurance issuer or the third-party administrator is required by regulation to provide separate payments for contraceptive services for plan participants and beneficiaries. The ACA's prohibition on cost sharing for preventive services, including contraception, bars the insurance issuer or third-party administrator from imposing any premium or fee on the group health plan, or plan participants and beneficiaries. Furthermore, the accommodation prohibits the insurance issuer or third-party administrator from imposing such fees on the eligible organization. *See* 42 U.S.C. § 300gg-13(a); 29 C.F.R. § 2590.715-2713A(b)(2), (c)(2)(ii); 45 C.F.R. § 147.131(c)(2)(ii). The insurance issuer or third-party administrator must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the [eligible organization's] group health plan" and "segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services." 29 C.F.R. § 2590.715-2713A(c)(2)(i)(A), (ii); 45 C.F.R. § 147.131(c)(2)(i)(A), (ii). The third-party administrator may Seek reimbursement for payments for contraceptive services from the federal government. 29 C.F.R. § 2590.715-2713A(b)(3).

Furthermore, the health insurance issuer or third-party administrator, *not* the eligible organization,

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approved contraceptives without cost sharing." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014).

provides notice to the plan participants and beneficiaries regarding contraceptive coverage "separate from" materials that are distributed in connection with the eligible organization's group health coverage, specifying that "the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints." *See* 26 C.F.R. § 54.9815-2713A(d); 29 C.F.R. § 2590.715-2713A(d); 45 C.F.R. § 147.131(d).[5] This is in accordance with the preventive services requirement of the ACA.

2. RFRA Challenge to the Accommodation

The appellees challenge the ACA's contraceptive coverage requirement as posing a substantial burden on their religious exercise, in violation of RFRA. RFRA places requirements on all federal statutes that impact a person's exercise of religion, even when

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[5] As part of this separate notice regime, eligible organizations do not need to provide the names of their beneficiaries to their insurance issuers or third-party administrators, or otherwise coordinate notices with them. *See Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 254 (D.C. Cir. 2014) (agreeing that "[n]o regulation related to the accommodation imposes any such duty on Plaintiffs"); *see also* 29 C.F.R. § 2590.715-2713A(b)(4) ("A third party administrator may not require any documentation other than a copy of the self-certification from the eligible organization or notification from the Department of Labor"); *id.* § 2590.715- 2713A(c)(1)(i) ("When a copy of the self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage An issuer may not require any further documentation from the eligible organization regarding its status as such.").

that federal statute is a rule of general applicability. 42 U.S.C. § 2000bb-1(a).[6] Under RFRA, the "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1(b).

Congress enacted RFRA in 1993 in response to the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Supreme Court rejected the balancing test for evaluating claims under the Free Exercise Clause of the First Amendment set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), under which the Court asked whether the challenged law substantially burdened a religious practice and, if it did, whether that burden was justified by a compelling governmental interest. The *Smith* Court concluded that the continued application of the compelling-interest test would produce a constitutional right to ignore neutral laws of general applicability and would "open the prospect of constitutionally required religious exemptions from civil obligations of almost every conceivable kind," which the First Amendment does not require. 494 U.S. at 888-89. "The government's ability to enforce

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[6] Because the issue was not raised before us, we assume that RFRA is constitutional as applied to federal laws and regulations. *But See City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding that Congress did not have authority under the Fourteenth Amendment to impose RFRA on state or local laws).

generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'" *Id.* at 885 (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988)). Making an individual's obligation to obey a generally applicable law contingent upon the individual's religious beliefs, except where the state interest is compelling, permits that individual, "by virtue of his beliefs, 'to become a law unto himself,'" which "contradicts both constitutional tradition and common sense." *Id.* (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

Congress then passed RFRA to legislatively overrule the *Smith* standard for analyzing claims under the Free Exercise Clause of the First Amendment. RFRA's stated purposes are: (1) to restore the compelling-interest test as set forth in *Sherbert* and *Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by the government. 42 U.S.C. § 2000bb(b). The Supreme Court has characterized RFRA as "adopt[ing] a statutory rule comparable to the constitutional rule rejected in *Smith*." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006).

B. Factual Background and Procedural History[7]

We review here the following District Court opinions: two preliminary injunctions issued in *Geneva College v. Sebelius*, and a preliminary injunction and permanent injunction issued in the related cases of *Most Reverend David A. Zubik v. Sebelius* and *Most Reverend Lawrence T. Persico v. Sebelius*. The *Zubik* and *Persico* appeals were consolidated and now have also been consolidated with the *Geneva* appeal.

1. *Geneva* Appellee

Appellee Geneva College ("Geneva") is a nonprofit institution of higher learning established by the Reformed Presbyterian Church of North America. Geneva believes that it would be sinful and immoral for it to intentionally participate in, pay for, facilitate, enable, or otherwise support access to abortion (including emergency contraceptives Plan B and ella, and two intrauterine devices, all of which Geneva characterizes as causing abortion) because such participation violates religious prohibitions on murder. Geneva contracts with an insurance issuer for its student and employee health insurance plans.

2. *Geneva* District Court Opinions

The District Court granted Geneva's motion for a preliminary injunction with respect to its student plan on June 18, 2013, and enjoined the government from applying or enforcing 42 U.S.C. § 300gg-13(a)(4) and requiring that Geneva's student health

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[7] The District Courts in these cases had jurisdiction pursuant to 28 U.S.C. § 1331, and this Court has appellate jurisdiction pursuant to 28 U.S.C. § § 1291, 1292(a)(1).

insurance plan, its plan broker, or its plan insurer provide "abortifacients" contrary to Geneva's religious objections. (J.A. 35-36.) The District Court began by stating that the Supreme Court has cautioned courts to be reluctant to "dissect religious beliefs" when engaging in a substantial burden analysis. (J.A. 24 (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981)).)

The District Court concluded that Geneva had shown a likelihood of success on the merits with respect to the presence of a substantial burden under RFRA and found that three Supreme Court free exercise cases supported Geneva's argument regarding the presence of a substantial burden under RFRA. First, it noted that in *Yoder*, 406 U.S. at 234-35, a state compulsory education law for children up to age sixteen, with a penalty of a criminal fine, violated the free exercise rights of the Amish plaintiffs. Second, in *Sherbert*, 374 U.S. at 410, the state could not withhold unemployment benefits from a worker who refused employment on the grounds that working Saturdays violated her religious beliefs. Third, in *Thomas*, 450 U.S. at 719, the state could not deny unemployment benefits to a worker whose religious beliefs forbade his participation in manufacturing tanks for use by the military. The District Court interpreted these cases as standing for the proposition that these indirect burdens on religious exercise are substantial enough to be cognizable under RFRA. The District Court concluded that Geneva had only two choices under the regulations—either provide the objected-to coverage or drop its health insurance—and by being forced to choose between those two options, both repugnant to

its religious beliefs,[8] Geneva faced a substantial burden.

The District Court then granted Geneva's second motion for a preliminary injunction, this time with respect to its employee plan, on December 23, 2013. The District Court again enjoined the government from enforcing 42 U.S.C. § 300gg-13(a)(4) and requiring that Geneva's employee health insurance plan, its plan broker, or its plan insurer provide "abortifacients" contrary to Geneva's religious objections. (J.A. 67-68.) The District Court concluded that Geneva had shown a likelihood of success on the merits as to the presence of a substantial burden because the self-certification process forced Geneva to facilitate access to services it finds religiously objectionable. First, the District Court emphasized that a court must assess the intensity of the coercion and pressure from the government, rather than looking at the merits of the religious belief. (J.A. 58 (citing *Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir.

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[8] We recognize that the appellees believe providing health insurance to their employees and students is part of their religious commitments. The appellees urge, at most, that dropping their health insurance coverage would be a violation of their moral beliefs, but they do *not* argue that it would be, in and of itself, another substantial burden imposed on their religious exercise. (Geneva Br. at 5 ("To fulfill its religious commitments and duties in the Christ-centered educational context, the College promotes the spiritual and physical well-being and health of its employees and students. This includes the provision of general health insurance to employees and their dependants and the facilitation of a student health plan."); Zubik/Persico Br. at 6 ("As part of overseeing their affiliates and as part of Catholic social teaching, the Dioceses provide self-insured health plans for Diocesan entities, including the Affiliates.").)

2013), *cert. denied sub nom. Burwell v. Korte*, 134 S. Ct. 2903 (2014), and *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137 (10th Cir.), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)).) The District Court analogized to cases involving the contraceptive coverage mandate for entities *not* eligible for the accommodation, such as the *Hobby Lobby* opinion in the Court of Appeals for the Tenth Circuit, which found that the substantial fines and penalties imposed on an entity that refused to offer health care coverage to its employees at all, or refused to provide coverage for the mandated preventive services, constituted a substantial burden.

The District Court was convinced by Geneva's explanation that, although Geneva must engage in the same conduct that it did before the ACA—namely, notify the insurance carrier that it would not provide coverage for the objected-to services—the effect of that conduct is now different. Before the ACA, Geneva's notification resulted in its employees being unable to obtain coverage for contraceptive services; after the ACA, Geneva's employees are still provided access to the services as a matter of law. "Under the ACA, Geneva has two choices: (1) provide insurance coverage to its employees, which will result in coverage for the objected to services; or (2) refuse to provide insurance coverage for its employees, which will result in fines, harm to its employees' well-being and competitive disadvantages. Both options require Geneva to act contrary to its religious duties and beliefs." (J.A. 61 n.12.)

Geneva argues that the District Court was correct that a substantial burden is present here because (1) complying with either the contraceptive coverage

requirement or the accommodation would cause Geneva to "trigger," "facilitate," or be "complicit" in the commission of acts that it likens to abortion; and (2) the fines that Geneva faces for its refusal to comply with the contraceptive coverage requirement or the accommodation would pressure it to conform.

3. *Zubik/Persico* Appellees

Appellees in the *Zubik* and *Persico* cases include: the Bishop of Pittsburgh, David A. Zubik, and the Bishop of Erie, Lawrence T. Persico; the Diocese of Pittsburgh and the Diocese of Erie, both of which qualify for the exemption to the contraceptive coverage requirement under 45 C.F.R. § 147.131(a); and Catholic Charities of the Diocese of Pittsburgh, Prince of Peace Center, St. Martin Center, and Erie Catholic Cathedral Preparatory School, which are all nonprofit organizations affiliated with the Catholic Church. The Catholic religious nonprofit organizations are controlled by their respective Dioceses and operate in accordance with Catholic doctrine and teachings. The Bishops oversee the management of the affiliated nonprofits with regard to adherence to Catholic doctrine. The Catholic faith prohibits providing, subsidizing, initiating, or facilitating insurance coverage for sterilization services, contraceptives, other drugs that the Catholic Church believes to cause abortion, and related reproductive educational and counseling services. The Dioceses provide self-insured health plans to the nonprofits and contract with third-party administrators to handle claims administration of the plans. As a result of their provision of coverage to the nonprofits, the Dioceses, which are otherwise exempt,

must comply with the contraceptive coverage requirement as to the nonprofits.

4. *Zubik/Persico* District Court Opinions

The District Court issued a preliminary injunction that applied to both the *Zubik* and *Persico* cases on November 21, 2013, and converted that injunction into a permanent injunction on December 20, 2013.

The District Court characterized the issue before it as "whether [the appellees], being non-secular in nature, are likely to succeed on the merits of proving that their right to freely exercise their religion has been substantially burdened by the 'accommodation' which requires the Bishops of two separate Dioceses

to sign a form which thereby facilitates/initiates the provision of contraceptive products, services, and counseling." (J.A. 116.) The *Zubik/Persico* appellees conceded that they have provided similar information as is required by the self-certification form to their third-party administrator in the past. However, their past actions barred the provision of contraceptive products, services, or counseling. Now, under the ACA, this information will be used to "facilitate/initiate the provision of contraceptive products, services, or counseling – in direct contravention to their religious tenets." (*Id.*) Accordingly, the District Court concluded that the government is impermissibly asking the appellees for documentation for what the appellees sincerely believe is an immoral purpose, and thus "they cannot provide it." (J.A. 117.) In conclusion, the District Court acknowledged that the accommodation allows the appellees to avoid directly paying for contraceptive services by shifting responsibility for providing contraceptive coverage. Despite this fact,

because the appellees had a sincerely held belief that this shift in responsibility did not exonerate them from the moral implications of the use of contraception, the accommodation imposed a substantial burden.

Furthermore, the District Court held that the differing application of the exemption and the accommodation—the former applying to the Catholic Church, and the latter applying to Catholic nonprofit organizations—has the effect of dividing the Catholic Church, thereby imposing a substantial burden. "[T]he religious employer 'accommodation' separates the 'good works (faith in action) employers' from the 'houses of worship employers' within the Catholic Church by refusing to allow the 'good works employers' the same burden-free exercise of their religion" under the exemption. (J.A. 118.) The District Court questioned why religious employers who share the same religious tenets are not exempt, or why all religious employers do not fall within the accommodation, such that "even though [the appellees] here share identical, religious beliefs, and even though they share the same persons as the religious heads of their organizations, the heads of [the appellees'] service organizations may not fully exercise their right to those specific beliefs, when acting as the heads of the charitable and educational arms of the Church." (J.A. 118, 120.) The District Court concluded that "the religious employer 'exemption' enables some religious employers to completely eliminate the provision of contraceptive products, services, and counseling through the Dioceses' health plans and third parties," whereas "the religious employer 'accommodation' requires other religious employers (often times the same

member with the same sincerely-held beliefs) to take affirmative actions to facilitate/initiate the provision of contraceptive products, services, and counseling – albeit from a third-party." (J.A. 120-21.)

The *Zubik/Persico* appellees argue that the District Court was correct in finding a substantial burden because (1) they interpret the accommodation to require them to authorize and designate a third party to add the objectionable coverage to their plans, in violation of their sincerely held religious beliefs that they cannot provide or facilitate that coverage; and (2) the different scope of the religious employer exemption and the accommodation impermissibly splits the Catholic Church.

The government, as appellant in both the *Zubik/Persico* and *Geneva* appeals, argues that the District Courts were incorrect and the appellees are not subject to a substantial burden, because the submission of the form is not in itself burdensome and does not give rise to the coverage. Rather, *federal law* requires third parties—insurance issuers and third-party administrators—to provide coverage after the appellees refuse to provide contraceptive coverage themselves. By invoking the accommodation process, the appellees do not facilitate the provision of contraceptive coverage by third parties. Rather, the third parties providing coverage do so as a result of legal obligations imposed by the ACA.

II. DISCUSSION

A. Standard of Review

We employ a tripartite standard of review for preliminary injunctions. "We review the District Court's findings of fact for clear error. Legal

conclusions are assessed de novo. The ultimate decision to grant or deny the injunction is reviewed for abuse of discretion." *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 105 (3d Cir. 2013) (quoting *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 252 (3d Cir. 2002)). The same framework applies to the review of a grant of a permanent injunction. *See United States v. Bell*, 414 F.3d 474, 477-78 (3d Cir. 2005).[9] Because we conclude that the appellees have not demonstrated a likelihood of success on the merits of their RFRA claim, we need not reach the other prongs of the injunction analysis.

B. Likelihood of Success as to Substantial Burden

1. Trigger/Facilitation/Complicity Argument

We first must identify what conduct the appellees contend is burdensome to their religious exercise. It is not the act of filling out or submitting EBSA Form 700 itself. The appellees conceded at oral argument that the mere act of completing EBSA Form 700 does not impose a burden on their religious exercise.

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[9] "A party seeking a preliminary injunction must show: (1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). It is the plaintiff's burden to establish every element in its favor. P.C. *Yonkers, Inc. v. Celebrations the Party & Seasonal Superstore, LLC*, 428 F.3d 504, 508 (3d Cir. 2005). A permanent injunction requires actual success on the merits. *See Shields v. Zuccarini*, 254 F.3d 476, 482 (3d Cir. 2001).

The appellees' essential challenge is that providing the self-certification form to the insurance issuer or third-party administrator "triggers" the provision of the contraceptive coverage to their employees and students. The appellees reframed this proposition at oral argument, stating that the accommodation requires them to be "complicit" in sin. Appellees urge that there is a causal link between providing notification of their religious objection to providing contraceptive coverage and the offering of contraceptive coverage by a third party. That link, they argue, makes them complicit in the provision of certain forms of contraception, which is prohibited by their religious beliefs.

Without testing the appellees' religious beliefs, we must nonetheless objectively assess whether the appellees' compliance with the self-certification procedure does, in fact, trigger, facilitate, or make them complicit in the provision of contraceptive coverage. Through RFRA's adoption of the Supreme Court's pre-*Smith* free exercise jurisprudence, Congress has required qualitative assessment of the merits of the appellees' RFRA claims. *See Korte*, 735 F.3d at 705 (Rovner, J., dissenting).[10] "It is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program

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[10] We note that the *Korte* majority opinion may have been undermined by the later decision of the Court of Appeals for the Seventh Circuit in *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 554 (7th Cir. 2014), *petition for cert. filed*, No. 14- 392 (Oct. 3, 2014). The majority opinion in *Notre Dame*, decided after *Korte* but before *Hobby Lobby*, analyzes the mechanics of the accommodation and weakens the *Korte* majority's urge for deference. This type of analysis remains good law after *Hobby Lobby*. *See Priests for Life*, 772 F.3d 229, 247 (D.C. Cir. 2014).

unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303 (1985). Furthermore, the Supreme Court has stated that "[a] governmental burden on religious liberty is not insulated from review simply because it is indirect; but the nature of the burden is relevant to the standard that the government must meet to justify the burden." *Bowen v. Roy*, 476 U.S. 693, 706-07 (1986) (citation omitted). These principles were applied in *Lyng*, where the Supreme Court recognized that the Native American respondents' beliefs were sincere, and that the government's proposed actions would have severe adverse effects on their religious practice. However, the Court disagreed that the burden on the respondents' belief was "*heavy enough* to violate the Free Exercise Clause unless the Government can demonstrate a compelling need to complete the road to engage in timber harvesting in the [challenged] area." 485 U.S. at 447 (emphasis added).

While the Supreme Court reinforced in *Hobby Lobby* that we should defer to the reasonableness of the appellees' religious beliefs, this does not bar our objective evaluation of the nature of the claimed burden and the substantiality of that burden on the appellees' religious exercise. This involves an assessment of how the regulatory measure actually works. Indeed, how else are we to decide whether the appellees' religious exercise is substantially burdened? "[T]here is nothing about RFRA or First Amendment jurisprudence that requires the Court to accept [the appellees'] characterization of the regulatory scheme on its face." *Mich. Catholic*

Conference & Catholic Family Servs., 755 F.3d 372, 385 (6th Cir. 2014) (quoting *Roman Catholic Archbishop of Wash. v. Sebelius*, 19 F. Supp. 3d 48, 71 (D.D.C. 2013)). We may consider the nature of the action required of the appellees, the connection between that action and the appellees' beliefs, and the extent to which that action interferes with or otherwise affects the appellees' exercise of religion—all without delving into the appellees' beliefs. *See, e.g., Korte*, 735 F.3d at 710 (Rovner, J., dissenting). For example, the court in *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008), "[a]ccept[ed] as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegations, that his religious exercise is substantially burdened." The court further explained: "we conclude that Kaemmerling does not allege facts sufficient to state a substantial burden on his religious exercise because he cannot identify any 'exercise' which is the subject of the burden to which he objects." *Id.*[11]

The Supreme Court in *Hobby Lobby* evaluated whether the requirement to provide contraceptive coverage absent the accommodation procedure

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[11] The *Zubik/Persico* appellees argue that we should not independently analyze the burdens imposed on them, or the substantiality of that burden, because the government stipulated to facts contained in the appellees' declarations—particularly, that the appellees believe that participation in the accommodation, including signing the self-certification form, facilitates moral evil in violation of Catholic doctrine. The appellees are mistaken, because the government's factual stipulation does not preclude this Court from determining the contours of the asserted burden or whether the burden is substantial.

substantially burdened the religious exercise of the owners of closely-held, for-profit corporations. The issue of whether there is an actual burden was easily resolved in *Hobby Lobby*, since there was little doubt that the actual *provision* of services did render the plaintiffs "complicit." And in *Hobby Lobby*, the Court came to its conclusion that, *without any accommodation*, the contraceptive coverage requirement imposed a substantial burden on the religious exercise of the for-profit corporations, because those plaintiffs were required to either provide health insurance that included contraceptive coverage, in violation of their religious beliefs, or pay substantial fines.[12] *See* 134 S. Ct. at 2775-76; *See also*

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[12] Indeed, Justice Alito's majority opinion in *Hobby Lobby* comments favorably on the accommodation procedure at issue here, which separates an eligible organization from the objected-to contraceptive services:

> HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs. As we explained above, HHS has already established an accommodation for nonprofit organizations with religious objections. Under that accommodation, the organization can self-certify that it opposes providing coverage for particular contraceptive services. If the organization makes such a certification, the organization's insurance issuer or third-party administrator must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan" and "[p]rovide separate payments for any contraceptive services required to be covered" without imposing "any cost-sharing requirements on the eligible organization, the group health plan, or plan participants or beneficiaries."
>
> We do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims. At a minimum, however, it does not impinge on the plaintiffs'

Priests for Life, 772 F.3d at 245. Here, the appellees are *not* faced with a "provide" or "pay" dilemma because they have a third option—notification pursuant to the accommodation—to avoid both providing contraceptive coverage to their employees and facing penalties for noncompliance with the contraceptive coverage requirement.

The appellees urge that a burden exists here because the submission of the self-certification form triggers, facilitates, and makes them complicit in the provision of objected-to services. But after testing that assertion, we cannot agree that the submission of the self-certification form has the effect the appellees claim. First, the self-certification form does not trigger or facilitate the provision of contraceptive coverage because coverage is mandated to be otherwise provided by federal law. *Federal law*, rather than any involvement by the appellees in filling out or submitting the self-certification form, creates the obligation of the insurance issuers and third-party administrators to provide coverage for contraceptive services. As Judge Posner has explained, this is not a situation where the self-certification form enables the provision of the very contraceptive services that the appellees find sinful. Rather, "[f]ederal law, not the religious organization's signing and mailing the form, requires health-care insurers, along with third-party administrators of self-insured plans, to cover contraceptive services."

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religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves HHS's stated interests equally well.

Hobby Lobby, 134 S. Ct. at 2782 (alterations in original) (footnotes omitted) (citations omitted).

Notre Dame, 743 F.3d at 554. Thus, federal law, not the submission of the self-certification form, enables the provision of contraceptive coverage.

The Court of Appeals for the Sixth Circuit adopted Judge Posner's logic that the obligation to cover contraception is not triggered by the act of self-certification. Rather, it is triggered by the force of law—the ACA and its implementing regulations. *See Mich. Catholic Conference*, 755 F.3d at 387 ("Submitting the self-certification form to the insurance issuer or third-party administrator does not 'trigger' contraceptive coverage; it is federal law that requires the insurance issuer or the third-party administrator to provide this coverage."). Most recently, and after the Supreme Court's opinion in *Hobby Lobby*, the Court of Appeals for the D.C. Circuit agreed with these courts' explanations of the mechanics of the accommodation. *See Priests for Life*, 772 F.3d at 252 ("As the Sixth and Seventh Circuits have also concluded, the insurers' or [the third-party administrators'] obligation to provide contraceptive coverage originates from the ACA and its attendant regulations, not from Plaintiffs' self-certification or alternative notice."). Thus, submitting the self-certification form means only that the eligible organization is not providing contraceptive coverage and will not be subjected to penalties. By participating in the accommodation, the eligible organization has no role whatsoever in the provision of the objected-to contraceptive services.[13]

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[13] Geneva argues that there is no guarantee that its employees and students would obtain the objected-to contraceptive coverage if they were not enrolled in Geneva's health plans. Therefore, Geneva asserts, the obligation to provide

Moreover, the regulations specific to the *Zubik* and *Persico* appellees' self-insured plan are no different in this respect, and in no way cause the appellees to facilitate or trigger the provision of contraceptive coverage. Those Department of Labor regulations state that EBSA Form 700 "shall be treated as a designation of the third party administrator as the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered." 29 C.F.R. § 2510.3-16(b). The *Zubik/Persico* appellees argue that these regulations cause it to "facilitate" the provision of contraceptives because the signed self-certification form authorizes the third-party administrator to serve as the plan administrator. However, this purported causal connection is nonexistent. The eligible organization has no effect on the designation of the plan administrator; instead,

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contraceptive coverage arises only because it sponsors an employee or student health plan. Geneva cites the following passage from *Notre Dame* in support: "By refusing to fill out the form Notre Dame would subject itself to penalties, but Aetna and Meritain would still be required by federal law to provide the services to the university's students and employees *unless and until their contractual relation with Notre Dame terminated*." 743 F.3d at 554 (emphasis added). However, Geneva's argument is unavailing. The provision of contraceptive coverage is not dependent upon Geneva's contract with its insurance company. "Once [the appellees] opt out of the contraceptive coverage requirement, contraceptive services are not provided to women because of [the appellees'] contracts with insurance companies; they are provided because federal law requires insurers and TPAs to provide insurance beneficiaries with coverage for contraception." *Priests for Life*, 772 F.3d at 253. "RFRA does not entitle [the appellees] to control their employees' relationships with other entities willing to provide health insurance coverage to which the employees are legally entitled." *Id.* at 256.

it is *the government* that treats and designates the third-party administrator as the plan administrator under ERISA. *See Notre Dame*, 743 F.3d at 555. "[The appellees] submit forms to communicate their decisions to opt out, not to authorize [the third-party administrators] to do anything on their behalf. The regulatory treatment of the form as sufficient under ERISA does not change the reality that the objected-to services are made available because of the regulations, not because [the appellees] complete a self-certification." *Priests for Life*, 772 F.3d at 254-55. Indeed, this "opt-out" is just that—an indication that the eligible organization chooses not to provide coverage for the objected-to services.

Moreover, the submission of the self-certification form does not make the appellees "complicit" in the provision of contraceptive coverage. If anything, because the appellees specifically state on the self-certification form that they object on religious grounds to providing such coverage, it is a declaration that they *will not be complicit* in providing coverage. Ultimately, the regulatory notice requirement does not necessitate any action that interferes with the appellees' religious activities. "The organization must send a single sheet of paper honestly communicating its eligibility and sincere religious objection in order to be excused from the contraceptive coverage requirement." *Id.* at 249. The appellees "need only reaffirm [their] religiously based opposition to providing contraceptive coverage, at which point third parties will provide the coverage separate and apart from [the appellees'] plan of benefits." *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 7 F. Supp. 3d 88, 104 (D.D.C. 2013), *aff'd*, *Priests for Life*, 772 F.3d 229 (D.C. Cir. 2014).

The appellees' real objection is to what happens after the form is provided—that is, to the actions of the insurance issuers and the third-party administrators, required by law, once the appellees give notice of their objection. "RFRA does not grant [the appellees] a religious veto against plan providers' compliance with those regulations, nor the right to enlist the government to effectuate such a religious veto against legally required conduct of third parties." *Priests for Life*, 772 F.3d at 251. "The fact that the regulations require the insurance issuers and third-party administrators to modify their behavior does not demonstrate a substantial burden on the [appellees]." *Mich. Catholic Conference*, 755 F.3d at 389.[14]

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[14] A hypothetical example serves as a useful tool to demonstrate the fallacy in the appellees' characterization of the accommodation: Assume that a person, John Doe, has a job that requires twenty-four-hour coverage, such as an emergency room doctor or nurse. John Doe is unable to work his shift on a certain Tuesday, as that day is a religious holiday that mandates a day of rest. As a result, John Doe believes that it is inappropriate for *anyone* to work on that holiday. John Doe can request time off by filling out a certain form, but he will be penalized if he fails to show up for work without appropriately requesting time off. However, by filling out this form, he believes that he will facilitate or trigger or be complicit in someone else working in his place on the religious holiday. John Doe sincerely believes that the simple filling out of the time-off request imposes a substantial burden on his religious beliefs. In this example, John Doe, like the appellees, is able to *express* his religious objection to working on a religious holiday by declining to work that day. John Doe's time-off request indicates that he will *not* be complicit in working on the religious holiday. Furthermore, declining to work on that Tuesday does *not* serve as a trigger or facilitator because one of his other colleagues will be forced to work that day, regardless of whether John Doe

Thus, we cannot agree with the appellees' characterization of the effect of submitting the form as triggering, facilitating, or making them complicit in the provision of contraceptive coverage. At oral argument, the appellees argued that it was not merely the filing of the form that imposed a burden, but, rather, what follows from it. But free exercise jurisprudence instructs that we are to examine the act the appellees must perform—not the effect of that act—to see if it burdens substantially the appellees' religious exercise. The Supreme Court has consistently rejected the argument that an independent obligation on a third party can impose a substantial burden on the exercise of religion in violation of RFRA, as we discuss below. Pre-*Smith* free exercise cases, which RFRA was crafted to resurrect, have distinguished between what a challenged law requires the objecting parties to do, and what it permits another party—specifically, the government—to do.

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works or not. However, just because John Doe does not wish to be associated with or play any role in the result (working on a religious holiday), does not mean the conduct to which he objects (filling out the time-off request form) substantially burdens his free exercise of religion. Just as we cannot conclude that John Doe's religious exercise is being burdened by filling out the form, we cannot conclude that the appellees' religious exercise is burdened by filling out the self- certification form. Furthermore, any "coercive" force attached to John Doe's refusal to fill out the time-off request is similar to the fines that the appellees face if they refuse to either participate in the accommodation or provide contraceptive coverage. In any event, such "coercive" force is relevant *only* if the conduct itself actually does substantially burden one's religious exercise. That is not the case in this analogy, and it is not the case for the appellees.

In *Bowen*, the Supreme Court determined that the Free Exercise Clause did not require the government to accommodate a religiously based objection to the statutory requirement that a Social Security number be provided to applicants for certain welfare benefits. Roy, a Native American, argued that the government's use of his daughter's Social Security number would "'rob the spirit' of his daughter and prevent her from attaining greater spiritual power." 476 U.S. at 696. Roy's claim was unsuccessful because "[t]he Federal Government's use of a Social Security number for [his daughter] d[id] not itself in any degree impair Roy's 'freedom to believe, express, and exercise' his religion." *Id.* at 700. Rather, Roy was attempting to use the Free Exercise Clause to dictate how the government should transact its business.

> Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family. The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. Just as the Government may not insist that appellees engage in any set form of religious observance, so appellees may not demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter. "[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual

> can extract from the government." The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.

Id. at 699-700 (quoting *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring)).

And, echoing the principles of *Bowen*, in *Lyng*, members of Native American tribes claimed that the federal government violated their rights under the Free Exercise Clause by permitting timber harvesting and construction on land used for religious purposes. 485 U.S. at 441-42. The Supreme Court concluded that the Free Exercise Clause "does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions." *Id.* at 450-51.

Building on this line of cases, the Court of Appeals for the D.C. Circuit concluded that a federal prisoner failed to state a RFRA claim when he sought to enjoin application of the DNA Analysis Backlog Elimination Act on the basis that DNA sampling, storage, and collection without limitations violated his religious beliefs about the proper use of the "building blocks of life." *Kaemmerling*, 553 F.3d at 674. Kaemmerling could not state a claim that his religious exercise was substantially burdened because he did not identify any religious exercise that was subjected to the burden to which he objected:

> The government's extraction, analysis, and storage of Kaemmerling's DNA information does not call for Kaemmerling to modify his religious behavior in any way—it involves no action or forbearance on his part, nor does it otherwise interfere with any religious act in which he engages. Although the government's activities with his fluid or tissue sample after the BOP takes it may offend Kaemmerling's religious beliefs, they cannot be said to hamper his religious exercise because they do not "pressure [him] to modify his behavior and to violate his beliefs."

Id. at 679 (alteration in original) (quoting *Thomas*, 450 U.S. at 718). "Like the parents in *Bowen*, Kaemmerling's opposition to government collection and storage of his DNA profile does not contend that any act of the government pressures him to change his behavior and violate his religion, but only seeks to require the government itself to conduct its affairs in conformance with his religion." *Id.* at 680.

Thus, the case law clearly draws a distinction between what the law may impose on a person over religious objections, and what it permits or requires a third party to do. Although that person may have a religious objection to what the government, or another third party, does with something that the law requires to be provided (whether it be a Social Security number, DNA, or a form that states that the person religiously objects to providing contraceptive coverage), RFRA does not necessarily permit that person to impose a restraint on another's action

based on the claim that the action is religiously abhorrent.

These cases confirm that we can, indeed should, examine the nature and degree of the asserted burden to decide whether it amounts to a substantial burden under RFRA. Furthermore, we must assess how the objected-to action relates to the appellees' religious exercise, and whether the appellees' objections focus on the action itself or the result of the action, i.e., the obligations placed upon a third party.

Far from "triggering" the provision of contraceptive coverage to the appellees' employees and students, EBSA Form 700 totally removes the appellees from providing those services. "[T]he regulations provide an opt-out mechanism that shifts to third parties the obligation to provide contraceptive coverage to which health insurance beneficiaries are entitled, and that fastidiously relieves [the appellees] of any obligation to contract, arrange, pay, or refer for access to contraception " *Priests for Life*, 772 F.3d at 252. The self-certification form requires the eligible organization or its plan to provide a copy to the organization's insurance issuer or third-party administrator in order for the plan to be administered in accordance with both the eligible organization's religious objection and the contraceptive coverage requirement. The ACA already takes into account beliefs like those of the appellees and *accommodates* them. "The accommodation in this case consists in the organization's washing its hands of any involvement in contraceptive coverage, and the insurer and the third-party administrator taking up

the slack under compulsion of federal law." *Notre Dame*, 743 F.3d at 557. The regulations accommodate the interests of religious institutions that provide health services, while not curtailing the public interest that motivates the federally mandated requirement that such services shall be provided to women free of charge. *Id.* at 551.

Because we find that the self-certification procedure does not cause or trigger the provision of contraceptive coverage, appellees are unable to show that their religious exercise is burdened. Even if we were to conclude that there is a burden imposed on the appellees' religious exercise, we would be hard-pressed to find that it is substantial. Whether a burden is "substantial" under RFRA is a question of law, not a question of fact. *See Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011). RFRA's reference to "substantial" burdens expressly calls for a qualitative assessment of the burden that the accommodation imposes on the appellees' exercise of religion. *Korte*, 735 F.3d at 705 (Rovner, J., dissenting). RFRA calls for a threshold inquiry into the nature of the burden placed on the appellees' free exercise of religion: "substantial" is a term of degree that invites the courts to distinguish between different types of burdens. *Id.* at 708.

We have stated that a substantial burden exists where (1) "a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other [persons] versus abandoning one of the precepts of his religion in order to receive a benefit"; or (2) "the government puts substantial pressure on an adherent to substantially modify his behavior and to

violate his beliefs." *See Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007) (interpreting a related statute, the Religious Land Use and Institutionalized Persons Act, which applies to prisoner and land use cases). However, a government action does not constitute a substantial burden, even if the challenged action "would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs," if the government action does not coerce the individuals to violate their religious beliefs or deny them "the rights, benefits, and privileges enjoyed by other citizens." *Lyng*, 485 U.S. at 449. Under this definition, can the submission of the self-certification form, which relieves the appellees of any connection to the provision of the objected-to contraceptive services, really impose a "substantial" burden on the appellees' free exercise of religion? We think not. While *Hobby Lobby* rejected the argument that the burden was too attenuated because the actual use of the objected-to contraceptive methods was a matter of individual choice, here, where the actual provision of contraceptive coverage is by a third party, the burden is not merely attenuated at the outset but totally disconnected from the appellees.

The reasoning of the District Courts was misguided in two ways. First, the District Courts accepted the appellees' characterization of the accommodation as causing them to "facilitate," act as the "central cog," or serve as the "necessary stimulus" for the provision of the objected-to contraceptive services. (J.A. 60-61.) For the reasons we have detailed, we cannot accept that characterization as a matter of fact or law. Second, the District Courts focused on the coercive effect, i.e., the fact that the

appellees faced a choice: submit the self-certification form and "facilitate" the provision of contraceptive coverage, or pay fines for noncompliance. However, now that we have dispelled the notion that the self-certification procedure is burdensome, we need not consider whether the burden is substantial, which involves consideration of the intensity of the coercion faced by the appellees. We will accordingly reverse the challenged injunctions.

2. Dividing the Catholic Church Argument in *Zubik/Persico*

The appellees in *Zubik/Persico* argue that a second substantial burden is imposed on their religious exercise in that the contraceptive coverage regulatory scheme improperly partitions the Catholic Church by making the Dioceses eligible for the exemption, while the Catholic nonprofits can only qualify for the accommodation, even though all the Catholic entities share the same religious beliefs. The District Court agreed with the appellees and concluded that the contraceptive mandate "would cause a division between the Dioceses and their nonprofit, religious affiliated/related spiritual/charitable/educational organizations which fulfill portions of Dioceses' mission. Further, any nonprofit, religious affiliated/related organizations expelled from the Dioceses' health insurance plans would require significant restructuring of the plans which would adversely affect the benefits received from pooling resources." (J.A. 76 (citation omitted).) We conclude that the inclusion of houses of worship in the exemption and religious nonprofits in the accommodation does not impose a substantial burden on the *Zubik/Persico* appellees.

The definition of a "religious employer" who receives an exemption from the contraceptive coverage requirement under the regulations is based on longstanding Internal Revenue Code provisions. *See* 45 C.F.R. § 147.131(a) (citing 26 U.S.C. § 6033(a)(3)(A)(i), (iii)). "[R]eligious employers, defined as in the cited regulation, have long enjoyed advantages (notably tax advantages) over other entities, without these advantages being thought to violate the establishment clause." *Notre Dame*, 743 F.3d at 560 (citation omitted) (citing *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 666, 672-73 (1970)). The Departments chose this definition from the Internal Revenue Code to categorize the entities subject to the exemption and the accommodation because that provision was a bright line that was already statutorily codified and frequently applied: "The Departments believe that the simplified and clarified definition of religious employer continues to respect the religious interests of houses of worship and their integrated auxiliaries in a way that does not undermine the governmental interests furthered by the contraceptive coverage requirement." 78 Fed. Reg. at 39,874; *see also* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8461 (proposed Feb. 6, 2013) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590, and 45 C.F.R. pts. 147, 148, & 156) ("[T]his definition was intended to focus the religious employer exemption on 'the unique relationship between a house of worship and its employees in ministerial positions.'" (quoting Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011)

(codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; and 45 C.F.R. pt. 147))).

Furthermore, we are not persuaded that the challenged accommodation poses any burden on the *exempted* appellees' religious exercise, particularly a burden that would require the appellees to "expel" the religious nonprofit organizations from the Dioceses' health insurance plans. *See, e.g., Roman Catholic Archdiocese of N.Y. v. Sebelius*, 987 F Supp. 2d 232, 252 (E.D.N.Y. 2013) ("First, it is not at all clear why the Diocesan plaintiffs would have to 'expel' their non-exempt affiliates from their health plans. Second, even if the law did pressure the Diocesan plaintiffs to 'expel' their affiliates, plaintiffs do not state that the Diocesan plaintiffs' religious beliefs require them to have all their affiliate organizations on a single health plan, such that 'expelling' the non-exempt affiliates would be an act forbidden by their religion.").

Thus, we cannot agree that the different treatment afforded to the Catholic Church as a house worship versus the Catholic nonprofit organizations imposes a substantial burden in violation of RFRA.

III. CONCLUSION

We will reverse the District Courts' orders granting the challenged injunctions. Because we conclude that the appellees have not shown a likelihood of success on the merits of their RFRA claim, based on the determination that the accommodation does not impose a substantial burden on their religious exercise, we need not reach the question of whether the accommodation is the least restrictive means of furthering a compelling governmental interest.

OFFICE OF THE CLERK
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215-597-2995
April 15, 2015

Mr. Robert V Barth Jr.
United States District Court for the Western District of Pennsylvania
P.O. Box 1820
Erie, PA 16501

RE: Lawrence Persico, et al v. Secretary United States Depart, et al
Case Numbers: 14-1376, 13-3536, 14-1374, 14-1377
District Case Numbers: 1-13-cv-00303, 2-12-cv-00207, 2-13-cv-01459

Dear District Court Clerk,

Enclosed herewith is the certified judgment together with copy of the opinion in the above- captioned case(s). The certified judgment is issued in lieu of a formal mandate and is to be treated in all respects as a mandate.

Kindly acknowledge receipt for same on the enclosed copy of this letter.

Counsel are advised of the issuance of the mandate by copy of this letter. The certified judgment is also enclosed showing costs taxed, if any.

Very truly yours,

/s/ Maria M. Waldron
Marcia M. Waldron, Clerk

By: /s/ Timothy McIntyre
Timothy McIntyre, Case Manager
267-299-4953

cc: Gregory S. Baylor

Matthew S. Bowman
Kimberlee W. Colby
Charles E. Davidow
Leon F. DeJulius Jr.
Deborah J. Dewart
John D. Goetz
Adam C. Jed
Ira M. Karoll
Ayesha N. Khan
Alison M. Kilmartin
Alisa B. Klein
Patrick Nemeroff
Paul M. Pohl
Sara J. Rose
Sarah Somers
Mary Pat Stahler
Mark B. Stern

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

MOST REVEREND DAVID A. ZUBIK, *Bishop of the Roman Catholic Diocese of Pittsburgh, as Trustee of the Roman Catholic Diocese of Pittsburgh, a Charitable Trust, ET AL.*,

Plaintiffs,

v.

KATHLEEN SEBELIUS, *In Her Official Capacity as Secretary of the U.S. Department of Health and Human Services, ET AL.*,

Defendants.

13cv1459
ELECTRONICALLY FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

MOST REVEREND LAWRENCE T. PERSICO, *Bishop of the Roman Catholic Diocese of Erie, as Trustee of the Roman Catholic Diocese of*

13cv1459
ELECTRONICALLY

Erie, a Charitable Trust, ET AL.,

Plaintiffs,

v.

KATHLEEN SEBELIUS, *In Her Official Capacity as Secretary of the U.S. Department of Health and Human Services, ET AL.*,

Defendants.

FILED

MEMORANDUM OPINION RE: PLAINTIFFS' MOTIONS FOR EXPEDITED PRELIMINARY INJUNCTION
(13-CV-1459: DOC. NO. 4; 13-CV-0303E: DOC. NO. 6)

I. Introduction

Presently before the Court are two cases which challenge the application of provisions of the Patient Protection and Affordable Care Act ("ACA"). These cases present the Court with the issue of whether the Dioceses of Pittsburgh and Erie, which are exempt from provisions of the ACA requiring employers to provide health insurance coverage for contraceptive products, services, and counseling ("the contraceptive mandate"), are divisible from their nonprofit, religious affiliated/related charitable and educational organizations which, under the current provisions, will be compelled to facilitate/initiate coverage of contraceptive products, services, and counseling,

beginning January 1, 2014, in violation of their sincerely-held religious beliefs.[1]

On October 8, 2013, in the Pittsburgh division of the United States District Court of the Western District of Pennsylvania, Plaintiffs: Most Reverend David A. Zubik, as Trustee of the Roman Catholic Diocese of Pittsburgh, a charitable trust; the Roman Catholic Diocese of Pittsburgh, as the Beneficial Owner of the Pittsburgh series of the Catholic Benefits Trust; and Catholic Charities of the Diocese of Pittsburgh, Inc. ("Pittsburgh Plaintiffs"), filed a Complaint in which they assert eight causes of action against Defendants: United States Departments of Health and Human Services, Labor, and Treasury, and their respective Secretaries. *Zubik v. Sebelius*, Civil Action 2:13-cv-1459 (W.D. Pa. 2013). Pittsburgh Plaintiffs simultaneously filed a Motion for Expedited Preliminary Injunction, asking this Court to issue a preliminary injunction to enjoin the issuance, application, and enforcement of the contraceptive mandate, as codified in 45 C.F.R. § 147.130(a)(1)(iv). Doc. No. 4.

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[1] Generally, the three most relevant sincerely-held religious beliefs of the Catholic faith at issue in these cases are: (1) the sanctity of human life from conception to natural death; (2) unity of worship, faith, and good works ("faith without good works is dead"); and (3) the facilitation of evil is as morally odious as the proliferation of evil. See Hearing testimony: Bishop Zubik, pg. 21, lines 12-14, pg. 28, lines 17-20, pg. 35, lines 17-18, pg. 42, lines 21-25; Bishop Persico, pg. 73, lines 7-9, pg. 75, lines 16-19, pg. 79, lines 24-25, pg. 80, lines 6-8, pg. 83, lines 6-9. These three sincerely-held religious beliefs and their intersection with the ACA will be more thoroughly discussed, *infra*.

Also, on October 8, 2013, in the Erie division of this District Court, Plaintiffs: Most Reverend Lawrence T. Persico, as Trustee of the Roman Catholic Diocese of Erie, a charitable trust; the Roman Catholic Diocese of Erie; St. Martin Center, Inc.; Prince of Peace Center, Inc.; and Erie Catholic Preparatory School ("Erie Plaintiffs"), filed a Complaint in which they assert the same eight causes of action against the same Defendants ("the Government") related to the implementation of the contraceptive mandate of the ACA. *Persico v. Sebelius*, Civil Action 1:13-cv-303 (W.D. Pa. 2013). Erie Plaintiffs also filed a Motion for Expedited Preliminary Injunction asking the Court to issue a preliminary injunction to enjoin the issuance, application, and enforcement of the contraceptive mandate, as codified in 45 C.F.R. § 147.130(a)(1)(iv). Doc. No. 6.

Plaintiffs allege that the contraceptive mandate, as applied via the "accommodation," requires them to facilitate/initiate the process for providing health insurance coverage for abortion-inducing drugs, sterilization services, contraceptives, and related educational and counseling services ("contraceptive products, services, and counseling"). The Dioceses, as "religious employers," are exempt from these provisions. *See generally* Stipulations of Fact, ¶ 31; 13-cv-1459, Doc. No. 1, ¶ 44-46. A safe harbor for non-grandfathered, non-exempt organizations (including Plaintiffs: Catholic Charities, St. Martin Center, Prince of Peace Center, and Erie Catholic) from enforcement of these provisions has been extended until December 31, 2013. Additional Stipulated Facts, ¶ 7, citing 77 Fed. Ref. 8725, 8727 (Feb. 15, 2012). Non-exempt Plaintiffs in both cases must comply with the contraceptive mandate on or

before January 1, 2014, or potentially face substantial governmental penalties. 13-cv-303, Doc. No. 1, ¶ 164; Declaration of David Murphy[2] (P-91), ¶ 9.

Plaintiffs allege that facilitating/initiating the process for providing health insurance coverage for contraceptive products, services, and counseling would cause immediate and irreparable injury to their fundamental rights and religious liberties, in violation of the Religious Freedom Restoration Act ("RFRA") and the First Amendment to the United States Constitution.[3] Doc. No. 4, 2.

This Memorandum Opinion will address both cases because the cases (although not consolidated) involve: similar facts (including the same religious tenets), the same counsel, the same causes of action advanced against the same Defendants, and the same legal tests apply to the Motions for Expedited Preliminary Injunction.

After consideration of Plaintiffs' Motions (13-cv-0303: Doc. No. 6; 13-cv-1459: Doc. No. 4), the Parties' submissions, the testimony presented during an evidentiary hearing, the hearing Exhibits, and an

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[2] David Murphy is employed as the Chief Financial Officer of the Diocese of Erie. P-91, ¶ 2.

[3] Plaintiffs also assert violations of the Administrative Procedure Act ("APA"), Count VII, and erroneous interpretation of the exemption with respect to multi-employer plans, Count VIII. 13-cv-303, Doc. No. 1, ¶¶ 240-264; Doc. No. 1, ¶¶ 255-279. For the purposes of this Memorandum Opinion, the Court will focus its analysis on Plaintiffs' arguments related to alleged violations of the RFRA and the First Amendment of the United States Constitution.

amici curiae brief,[4] Plaintiffs' Motions for Expedited Preliminary Injunction will be GRANTED.

II. Findings of Fact[5]

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[4] The American Civil Liberties Union Foundation and the American Civil Liberties Union Foundation of Pennsylvania have filed a brief of *Amici Curiae* in Opposition to Pittsburgh Plaintiffs' Motion for Expedited Preliminary Injunctions. 13-cv-1459, Doc. No. 29.

[5] The Government does not challenge Plaintiffs' factual contentions as set forth in Declarations in Support of the Motions for Expedited Preliminary Injunction or the sincerity of Plaintiffs' religious beliefs as set forth in the Complaints. Stipulations of Fact (filed in 13-cv-303, Doc. No. 39 and 13-1459, Doc. No. 43), ¶¶ 52-56, 114-117; Doc. No. 16, ¶ 5(a)-(b); Declarations re-filed as part of the record as 13-cv-303, Doc. Nos. 54-50-54-56; 13-cv-1459, Doc. Nos. 55-86-55-56. Plaintiffs' Exhibits P-1-P-36, P-46, P-51, P-75, P-79, P-85, P-86-P-92 were admitted without objection (the same Exhibits and Exhibit numbers were used in reference to both cases). The Parties also filed Additional Stipulated Facts. 13-cv-303, Doc. No. 58; 13-cv-1459, Doc. No. 59.

The Court appreciates the Parties' efficient, thorough, and extensive Stipulations of Fact, and the professionalism of counsel throughout this entire matter. Throughout the Opinion, the Court will cite to the Parties' Joint Stipulations, Plaintiffs' respective Complaints, hearing Exhibits, and where possible, to Declarations in Support and hearing testimony.

The burdens imposed on Plaintiffs by the contraceptive mandate, the Government's stated compelling interest, and potential alternatives to the contraceptive mandate, are *not* agreed upon by the parties, because the Government is unwilling to stipulate to these matters. 13-cv-303, Doc. No. 30, (II)(2)(b); 13-cv-1459, Doc. No. 25, (II)(2)(b).

The Findings of Fact also are founded upon credibility determinations made by this Court based upon the Court's observation of the witnesses.

A. Plaintiffs

The Pittsburgh Plaintiffs in *Zubik v. Sebelius* are: (1) the Most Reverend David A. Zubik, Bishop and Trustee of the Roman Catholic Diocese of Pittsburgh ("the Bishop" or "Bishop Zubik"); (2) the Roman Catholic Diocese of Pittsburgh, a Pennsylvania Charitable Trust ("the Diocese" or "the Diocese of Pittsburgh"); and (3) Catholic Charities of the Diocese of Pittsburgh, Inc. ("Catholic Charities"), an affiliate nonprofit corporation of the Diocese of Pittsburgh. Doc. No. 1, 4.

The Pittsburgh Plaintiffs are interrelated because of their affiliation with the Catholic Church and their shared sincerely-held religious beliefs and mission. Bishop Zubik is the spiritual leader of the Diocese and is responsible for the spiritual, charitable, and educational arms of the Diocese. Catholic Charities is a nonprofit corporation affiliated with the Diocese and with a principal place of administration in Pittsburgh, Pennsylvania. The Diocese of Pittsburgh and Catholic Charities are organized exclusively for charitable, religious, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code. Doc. No. 1, ¶¶ 11 13.

The Plaintiffs in *Persico v. Sebelius* are: (1) the Most Reverend Lawrence T. Persico, Bishop and Trustee of the Roman Catholic Diocese of Erie ("the Bishop" or "Bishop Persico"); (2) St. Martin Center, Inc. ("St. Martin Center"), a nonprofit corporation affiliated with Catholic Charities, with its principal

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For ease of reference, when discussing the case pending in Erie, documents referenced are filed in 13-cv-303; for the case pending in Pittsburgh, all documents are filed in 13-cv-1459.

place of business in Erie, Pennsylvania; (3) Prince of Peace Center, Inc. ("Prince of Peace Center"), a nonprofit corporation affiliated with Catholic Charities, with its principal place of business in Farrell, Pennsylvania; and (4) Erie Catholic Preparatory School ("Erie Catholic"), a nonprofit corporation, with its principal place of business in Erie, Pennsylvania. Doc. No. 1, ¶¶ 11 14.

The Erie Plaintiffs are interrelated because of their affiliation with the Catholic Church and their shared sincerely-held religious beliefs and mission. St. Martin Center, Prince of Peace Center, Erie Catholic, and the Diocese of Erie are organized exclusively for charitable, religious, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code. Doc. No. 1, ¶¶ 11-14.

B. Immediate Harm Claimed by Plaintiffs

The Dioceses of Pittsburgh and Erie provide health insurance coverage to employees of their nonprofit, religious affiliated/related entities (such as Catholic Charities, St. Martin Center, Prince of Peace Center, and Erie Catholic) which are directed by the Dioceses to implement the spiritual, charitable, and educational mission of the Dioceses.

1. Immediate Harm as to the Dioceses

Based upon the credible testimony of Bishop Zubik and Bishop Persico, as Trustees for the Plaintiff nonprofit, religious affiliated/related organizations, the practical results of the application of the contraceptive mandate, via the "accommodation," would be that the Dioceses would be required to either:

(a) provide their nonprofit, religious affiliated/related organizations with a separate insurance policy that covers contraceptive products, services, and counseling (which the Dioceses refuse to do, according to the trial testimony). Hearing Testimony, Bishop Zubik, pg. 43, lines 2-10; Hearing Testimony Bishop Persico, pg. 80, lines 1-8, pg. 82, lines 14-16, pg. 91, lines 7-9; or

(b) decline to continue offering health coverage to their nonprofit, religious affiliated/related organizations. This would force the nonprofit, religious affiliated/related organizations to enter into their own arrangements with a health insurance provider that would arrange no-cost coverage of contraceptive products, services, and counseling. 13-cv-303, Doc. No. 1, ¶ 118; Doc. No. 1, ¶ 159; Declaration of Susan Rauscher[6] (P-86),[7] ¶¶ 13-15;

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[6] Susan Rauscher is employed as the Executive Director of Catholic Charities of the Diocese of Pittsburgh. P-86, ¶ 2.

[7] All Declarations in these cases were originally filed as attachments to Plaintiffs' Motions for Expedited Preliminary Injunctions. 13-cv-303, Doc. Nos. 9-8, 9-9, 9-10, 9-11; 13-cv-1459, Doc. Nos. 4-10, 4-11, 4-12. During the hearing on Plaintiffs' pending Motions, the Declarations were assigned Exhibit numbers and admitted into evidence. P-86-P-92. The Court will cite to Declarations by the relevant Exhibit numbers. These documents have been filed and can be found at: 13-cv-303, Doc. Nos. 54-50 through 54-56 and 13-cv-1459, Doc. Nos. 55-50 through 55-56.

Declaration of David S. Stewart[8] (P-87), ¶ 18.

The contraceptive mandate would be unequally applied to Plaintiffs and would result in some schools, organizations, etc., being exempt from the mandate, while other organizations would not. 13-cv-1459, Doc. No. 1, ¶ 31. The result would cause a division between the Dioceses and their nonprofit, religious affiliated/related spiritual/charitable /educational organizations which fulfill portions of Dioceses' mission. *Id.* Further, any nonprofit, religious affiliated/related organizations expelled from the Dioceses' health insurance plans would require significant restructuring of the plans which would adversely affect the benefits received from pooling resources. 13-cv-303, Doc. No. 1, ¶ 119; Doc. No. 1, ¶ 159.

2. Immediate Harm as to Nonprofit, Religious Affiliated/Related Organizations

Based upon the credible testimony of Susan Rauscher (Executive Director of Catholic Charities of the Diocese of Pittsburgh), Father Scott William Jabo (President of Erie Catholic), and Mary Claire Maxwell (Executive Director of Catholic Charities of the Diocese of Erie), and the Stipulations of the Parties, the nonprofit, religious affiliated/related organizations expelled from a Diocese's health plan would be forced to choose one of the following courses of action:

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[8] David Stewart is employed as the Risk/Benefits Manager of the Diocese of Pittsburgh. P-87, ¶ 2.

(a) purchase health insurance coverage that includes contraceptive products, services, and counseling [which would violate their sincerely-held religious beliefs, according to the trial testimony]. Cardinal Dolan Deposition[9] (13-cv-303, Doc. No. 52; 13-cv-1459, Doc. No. 53), pg. 25, lines 15-19, 23-25, pg, 26, lines 1 12; Hearing Testimony, Bishop Zubik, pg. 28, lines 16-22; Declaration of Father Ronald P Lengwin (P-88), ¶¶ 12-13;

(b) provide a self-certification to their third-party administrator ("TPA"), thus facilitating/ initiating the process by which the TPA will obtain coverage for the contraceptive products, services, and counseling for the organizations' employees ("the accommodation"[10]) [which the Bishops

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[9] Cardinal Dolan's testimony was presented at the hearing via video-taped deposition that was taken on November 7, 2013, in New York City, New York. 13-cv-303, Doc. No. 52; 13-cv-1459, Doc. No. 53.

[10] Per the "accommodation," the organization must self-certify that it: (1) "opposes providing coverage for some or all of [the] contraceptive services"; (2) is "organized and operates as a nonprofit entity"; and (3) "holds itself out as a religious organization." The organization must then provide a signed self-certification to its insurance company, or if self-insured, to its TPA. 26 CFR § 54.9815-2713A(a).

Per trial testimony, the self-certification would be completed by the head of the respective nonprofit, religious affiliated/related charitable and educational organizations at the direction of the Bishop of the Diocese. Hearing Testimony, Susan Rauscher, pg. 57, line 1, pg. 60, line 15-16; Hearing Testimony, Father Jabo, pg. 95, lines 6-7, pg. 98, lines 7-8; Hearing Testimony, Mary Maxwell, pg. 114, lines 20-23. The Court notes that Bishop

would refuse to permit]. Plaintiffs' Exhibit 10 "Certification"; Hearing Testimony, Bishop Zubik, pg. 43, lines 2-10; Hearing Testimony, Bishop Persico, pg. 80, lines 1-8, pg. 82, lines 14-16, pg. 91, lines 7-9;

(c) drop health insurance coverage for employees (*i.e.*, fail to offer "full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan") (*i.e.*, comprehensive coverage), and be subject to annual fines of $2,000 per full-time employee. Stipulations of Fact, ¶ 51; *see* 26 U.S.C. § 4980H(a), (c)(1); 13-cv-303, Doc. No. 1, ¶ 150. Said assessed payment shall be "paid upon notice and demanded by the Secretary," "assessed and collected in the same manner as taxes" and provided for "on an annual, monthly or other periodic basis as the Secretary may

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Zubik testified that he believed that he would have to sign the self-certification because of his position as Chairman of the Membership Board of Catholic Charities. Hearing Testimony, Bishop Zubik, pg. 43, lines 5-7.

As a result of the self-certification, the designated insurance company or TPA is required to arrange contraceptive services coverage of the organization's employees. Such services are provided without "cost-sharing requirements (such as copayment, coinsurance, or a deductible.)" *Id.* at § 54.9815-2713A(b)(2), (c)(2); 13-cv-303, Doc. No. 1, ¶¶ 99, 110. After providing the signed self-certification, the Dioceses would be obliged to provide the TPA with the names of individuals insured through the Diocesan health plan who are employees of non-exempt entities and sponsor the insurance. Hearing Testimony, Bishop Zubik, pg. 35, lines 17-19, Doc. No. 4-12, ¶ 31.

prescribe." *See* 26 U.S.C. §§ 4980H(d)(1)-(2), 6671(a); or

(d) purchase health insurance coverage for full-time employees without contraceptive products, services, and counseling, and potentially be subject to a tax penalty of $100 *per day* per affected beneficiary.[11] Stipulations of Fact, ¶ 50(a); Additional Stipulated Facts, ¶ 13; *see* 26 U.S.C. § 4980D(b); 13-cv-303, Doc. No. 1, ¶ 150; Declaration of David Murphy (P-91), ¶ 17; 13-1459: Declaration of Susan Rauscher (P-86), ¶ 22; Doc. No. 1, ¶ 70.

Any of these courses of action would harm the Dioceses and their nonprofit, religious affiliated/related charitable and educational organizations. Potential effects of imposition of fines include: decreased donations, loss of employees to other employers, loss of services, and such fines may "close [the organizations'] doors, denying thousands in the local community its charitable services." Declaration of Susan Rauscher (P-86), ¶¶ 28-30. During the Injunction Hearing, credible testimony was presented that fines related to the contraceptive mandate will compel Plaintiff nonprofit, religious affiliated/related organizations to limit services or close. Hearing Testimony, Susan Rauscher (re: Catholic Charities of the Diocese of Pittsburgh), pg.

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[11] The Parties have stipulated that "it is not possible to determine the exact amount of tax Plaintiffs could be assessed under this penalty." Additional Stipulated Facts, ¶ 14; 13-cv-303, Doc. No. 58; 13-cv-1459, Doc. No. 59. Where applicable, the Court will refer to testimony presented as to estimated fines that may be levied on various Plaintiffs for non-compliance.

61, lines 17-18 (fines could not be paid "without significant changes to the organization."), pg. 62, lines 21-25; Hearing Testimony Father Jabo (re: Erie Catholic), pg. 99, lines 8-10 ("In essence we'd have to shut our doors completely because we cannot sustain ourselves. As a school with a budget, limited resources, we would close our doors."); Hearing Testimony of Mary Maxwell (re: St. Martin Center and Prince of Peace Center), pg. 115, lines 23-25 (fines "would be devastating for all of our clients, the poor – these are single women, children."); Declaration of Mary Maxwell (P-90), ¶ 20; Declaration of Father Scott Detisch, Ph.D.[12] (P-92), ¶ 32.

Currently, Plaintiffs are experiencing and may continue to experience increased administrative burdens, lost personnel hours, and the fear of increased insurance premiums. Deposition of Cardinal Timothy Michael Dolan (13-cv-303, Doc. No. 52; 13-cv-1459, Doc. No. 53), pg. 40, lines 22-25, pg. 41, 1-7; Declaration of David S. Stewart (P-87), ¶¶ 23-26.

Failure to comply with the contraceptive mandate would expose the organizations, and ultimately the Dioceses, to civil actions by ERISA-covered plan participants for unpaid benefits, and enforcement actions by the Secretary of Labor. Stipulations of Fact, ¶ 50(b)-(c); Doc. No. 1, ¶ 81(c)-(d); *see* 29 U.S.C. §§ 1132(a)(1)(B), 1132(a)(5), and 1132(b)(3). The Secretary of HHS may impose a civil monetary

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[12] Father Detisch is serving as a theological advisor to Bishop Persico on matters of Catholic doctrine, including moral theology. P-92, ¶ 2.

penalty for failure to provide certain required coverage. Stipulations of Fact, ¶ 50(d); 42 U.S.C. § 300gg-22(b)(2)(C)(i). Failure to pay levied fines would subject Plaintiffs to additional fines and potential property liens. *See* 26 U.S.C. §§ 6321, 6672.

C. The Organization and Religious Mission of the Dioceses

1. Organization of Dioceses

Bishop Zubik, in his capacity as Bishop and Trustee of the Diocese of Pittsburgh, manages 200 parishes and their charitable trusts. Stipulations of Fact, ¶ 118. The Diocese provides services throughout six counties in Southwestern Pennsylvania – Allegheny, Beaver, Butler, Greene, Lawrence, and Washington – including a Catholic population of approximately 700,000 people. Stipulations of Fact, ¶ 119; 13-cv-1459, Doc. No. 1, ¶¶ 25-33.

Bishop Persico, in his capacity as the Bishop and Trustee of the Diocese of Erie, is responsible for 117 parishes serving approximately 187,500 people over a thirteen-county region in Northwestern Pennsylvania. Stipulations of Fact, ¶¶ 57, 65; 13-cv-303, Doc. No. 1, ¶¶ 26, 29.

2. Religious Mission of the Dioceses through Good Works

Plaintiffs sincerely believe that religious worship, faith, and good works are essential and integral components of the Catholic faith and constitute the core mission of the Catholic Church.[13] Declaration of

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[13] Hearing Testimony of Bishop Zubik, pg. 42, lines 21-25, pg. 43, line 1 ("We argue that the purpose of faith is not simply what we do in our churches on the weekend, but what we do at

Susan Rauscher (P-86), ¶ 21. "The Church's deepest nature is expressed in her three-fold responsibility: of proclaiming the word of God (*kerygma-martyria*), celebrating the sacraments (*leitourgia*), and exercising the ministry of charity (*diakonia*). These duties presuppose each other and are inseparable." Plaintiff's Exhibit 3, "Apostolic Letter Issued 'Motu Proprio' on the Supreme Pontiff Benedict XVI on the Service of Charity," pg. 1; Cardinal Dolan Deposition, (13-cv-303, Doc. No. 52, 13-cv-1459, Doc. No. 53), pg. 36, lines 1-36, pg. 38, lines 11-13 ("That's your daily life. That's everything we do, dream, believe, breathe, wake, sleep, is our – is our faith."); Hearing Testimony, Bishop Zubik, pg. 21, lines 12-14; Declaration of Father Ronald P Lengwin[14] (P-88), ¶ 37. "The service of charity is also a constructive element of the Church's mission and an indispensable expression of her very being ; all the faithful have the right and duty to provide charitable services." Plaintiffs' Exhibit 3, pg. 1.

D. Nonprofit Religious Affiliated/Related Charitable and Educational Organizations of the Dioceses of Pittsburgh and Erie

1. Role of Bishops in Organizations

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our work places and especially how we have the obligation to be reaching out to people who are in need. So that's an absolute essential to our faith and there is no split between the two."); Hearing Testimony of Bishop Persico, pg. 73, lines 7-9 ("Well, if we look at [S]cripture, faith without good works is dead, so I don't see how we can separate it. It's essential. It's who we are as Christians.").

[14] Father Lengwin is the Vicar General and General Secretary of the Diocese of Pittsburgh. P-88, ¶ 2.

As the heads of their respective Dioceses, the Bishops carry out the "good works" of the Catholic Church through: educating children regardless of their religion, promoting spiritual growth (including conducting religious services, operating seminaries, and hosting religious orders), and providing community service to others regardless of the recipient's religion or other factors. Stipulations of Fact, ¶¶ 58-61, 120; 13-cv-303, Doc. No. 1, ¶ 27; 13-cv-1459, Doc. No. 1, ¶ 26. " [T]he duty of charity [is] a responsibility incumbent upon the whole Church and upon each Bishop in his Diocese " Plaintiffs' Exhibit 3, pg. 1. Bishops have a duty to prevent parishes and "diocesan structures" from taking actions at odds with the Church's teachings. Plaintiffs' Exhibit 3, Article 9, § 3 ("It is the duty of the diocesan Bishop and the respective parish priests to see that in this area the faithful are not led into error or misunderstanding; hence they are to prevent publicity being given through parish or diocesan structures to initiatives which, while presenting themselves as charitable, propose choices or methods at odds with the Church's teaching."). Bishops also are responsible for "ensur[ing] that in the activities and management of these activities, the norms of the Church's universal, and particular law are respected, as well as the intentions of the faithful who made donations or bequests for these specific purposes." Plaintiffs' Exhibit 3, Article 4, § 3.

2. Catholic Schools

Education is an integral component of the Catholic faith. Hearing Testimony, Father Jabo, pg. 90, lines 24-25.

a. Diocese of Pittsburgh

The Diocese of Pittsburgh runs, organizes, and supervises approximately 11 high schools, 66 elementary schools, two non-residential schools for individuals with disabilities, and various preschool programs. Stipulations of Fact, ¶ 122. These schools educate approximately 22,000 students. Stipulations of Fact, ¶ 123; Doc. No. 1, ¶¶ 27-28. The Diocesan schools are open to and serve all children, without regard to the students' religion, race, or financial condition. Stipulations of Fact, ¶ 125. Some of the schools educate predominantly non-Catholic students. Stipulations of Fact, ¶ 129; Doc. No. 1, ¶ 30.

The contraceptive mandate, as applied via the "accommodation" and the "exemption," will result in elementary schools within the Diocese being treated differently – certain elementary schools within the Diocese will be exempt from compliance with the regulations, while others will not. Stipulations of Fact, ¶ 130.

b. Diocese of Erie

The Diocese of Erie operates approximately 30 elementary schools, 3 middle schools, and 6 secondary schools. These schools educate approximately 6,400 students. Stipulations of Fact, ¶ 62; Doc. No. 1, ¶ 28. Students are accepted regardless of religion. Stipulations of Fact, ¶ 63. Tuition assistance is offered to students based solely on financial need and for those who otherwise would have no alternative to the public school system. Stipulations of Fact, ¶¶ 63-64. These schools include Erie Catholic (an affiliated corporation), a preparatory high school, which was formed in 2010 by the merger of two Catholic schools and has

approximately 870 students. Stipulations of Fact, ¶¶ 96, 98, 108; Doc. No. 1, ¶¶ 54, 60. Erie Catholic's vision is "steeped in Gospel values and the mission of the Catholic Church." Stipulations of Fact, ¶ 103. The school's mission is to "form a Christ-centered, co-institutional, college preparatory Catholic school of the Diocese of Erie." Doc. No. 1, ¶ 57.

Erie Catholic implements the Church's teaching mission and has a strong religious component: daily mass is celebrated at the school; four years of theology are required for all students; students are required to perform qualified community service which may include "service to the school and parish community"; and religious retreats are organized. Stipulations of Fact, ¶¶ 104-107; Doc. No. 1, ¶¶ 58-59; Declaration of Father Scott Jabo (P-89), ¶ 4. The school is an affiliated corporation of the Diocese and endeavors to educate students in academic subjects and the Catholic faith as defined by the Diocese. Declaration of Father Scott Jabo (P-89), ¶ 13. Father Jabo, as President of Erie Catholic, is responsible for ensuring that the school and all of its functions are in line with Catholic Church teachings. Hearing Testimony, Father Jabo, pg. 91, lines 18-25, pg. 92, lines 1-4. The Diocese directly oversees the school's management and offers financial aid to its students through the Bishop assistance plan and the STAR Foundation. Stipulations of Fact, ¶¶ 97, 111; Doc. No. 1, ¶¶ 62, 65.

Erie Catholic is exempt from filing Form 990 ("Return of Organization Exempt from Income Tax")(26 C.F.R. § 1.6033-2(g)(vii). Stipulations of Fact, ¶ 112; Declaration of David Murphy (P-91), ¶ 13; 26 C.F.R. § 1.6033-2(g)(1)(vii). Erie Catholic is

not exempt from the contraceptive mandate because it is not an "integrated auxiliary" under the definition in 26 C.F.R. § 1.6033-2(h). Stipulations of Fact, ¶ 113; Doc. No. 1, ¶ 64. If Erie Catholic does not comply with the contraceptive mandate, as applied via the "accommodation," it could face estimated annual fines of approximately $2.8 million against an annual budget of approximately $10 million. Hearing Testimony of Father Jabo, pg. 98, lines 19-20, 23.

3. Social Service Organizations

Providing social services to others is a central tenet of the Catholic faith. Plaintiffs' Exhibit 12, "Catholic Charities of Diocese of Pittsburgh Bylaws"; 13-cv-303, Doc. No. 1, ¶ 33; Declaration of Susan Rauscher (P-86), ¶ 21. These "good works" are integral to the practice of the Catholic faith. Hearing Testimony, Bishop Persico, pg. 83, lines 6-9 (" it's faith and good works. You don't have two separate, [] they don't co-exist. It's all part of the same."). Social services must be provided in conformity with the Catholic faith. Hearing Testimony, Bishop Zubik, pg. 22, lines 22-23 ("The Catholic teaching and tradition and its teachings has to be observed in all instances.").

Consistent with this tenet, the Dioceses of Pittsburgh and Erie provide social services to the residents of their nineteen-county community. These services are provided without regard to national origin, race, color, sex, religion, age, or disability. Stipulations of Fact, ¶ 131. The Dioceses also assist many other local organizations, including organizations that: provide support to the homeless; provide scholarships to disadvantaged children of all faiths; and provide counseling and support to

struggling families. Stipulations of Fact, ¶ 132; 13-cv-303, Doc. No. 1, ¶¶ 31-32; 13-cv-1459, Doc. No. 1, ¶¶ 32-33. These social service programs receive support from the Diocese. 13-cv-303, Doc. No. 1, ¶ 33.

a. Pittsburgh

Plaintiff Catholic Charities is the primary social service agency of the Diocese under the leadership of Bishop Zubik, who serves as the Chairman of the Membership Board. Declaration of Susan Rauscher (P-86), ¶ 4; Declaration of Father Ronald P Lengwin (P-88), ¶ 5. Per its Bylaws, the Diocese of Pittsburgh "recognizes its obligation to bear witness to the charity of Christ, both in work and deed," and "performs its mission of social welfare through Catholic Charities " Plaintiffs' Exhibit 12 "Catholic Charities Diocese of Pittsburgh Bylaws, December 5, 2012," pg. 1.

As Chairman of the Membership Board, Bishop Zubik oversees the management of Catholic Charities. Charitable and educational agencies, such as Catholic Charities, must conform with the Bishop's authority. Plaintiffs' Exhibit 3, pg. 4, Article 4, §§ 3-4 ("For agencies not approved at the national level the competent authority is understood to be the diocesan Bishop where the agency has its principal office.)

Catholic Charities is required to completely adhere to the Catholic doctrine. Plaintiffs' Exhibit 3, pg. 2 (" there is a need to ensure that they are managed in conformity with the demands of the Church's teachings and the intentions of the faithful, and that they likewise respect the legitimate norms laid down by civil authorities."). As such, Catholic Charities

may not take actions that are inconsistent with the tenets of the Catholic Church. Plaintiffs' Exhibit 3, pg. 3, Article 1, § 3 (" the collective charitable initiatives to which this *Motu Proprio* refers are required to follow Catholic principles in their activity and they may not accept commitments which could in any way affect the observance of those principles.") (emphasis original.)

Annually, Catholic Charities provides approximately 230,000 acts of service for people in need in Southwestern Pennsylvania. Stipulations of Fact, ¶ 135. The organization has offices in all six counties of the Diocese of Pittsburgh and employs approximately 115 individuals. Stipulations of Fact, ¶¶ 136-137.

Like other charitable and educational organizations affiliated with the Catholic Church, the Diocese provides funding to Catholic Charities, its programs, and the Free Health Care Center. Stipulations of Fact, ¶ 154; 13-cv-1459, Doc. No. 1, ¶ 68. Catholic Charities serves the needy, underserved, and underprivileged through the efforts of its "Ambassadors of Hope" volunteers. Stipulations of Fact, ¶ 141. Catholic Charities could not exist without its volunteers and donor funding. Stipulations of Fact, ¶ 153. Catholic Charities supports other charitable organizations including Team HOPE (assists the needy to gain independence), St. Joseph House of Hospitality (residential and transitional housing facility), and two senior centers.

Catholic Charities' programs and services include adoption, counseling, safety net and stability services, health care for the uninsured, housing and

homeless assistance, pregnancy and parenting support, and refugee and senior services. In 2012, through its various social service programs, Catholic Charities provided approximately 68,141 meals to the hungry, 14,430 hours of case management to struggling individuals and families, and participated in 16,542 patient visits. Stipulations of Fact, ¶¶ 141, 148.

Catholic Charities offers free health services through the Free Health Care Center (a wholly-owned subsidiary of Catholic Charities). The free health services provided at the Free Health Care Center in 2012 are valued at nearly $1.5 million. Stipulations of Fact, ¶ 144-148. The Free Health Care Center is the only facility of its kind in the Pittsburgh region. Stipulations of Fact, ¶ 145. The Center is critical to the region and has provided free preventative and primary care to nearly 15,000 individuals during more than 35,000 patient visits. *Id.* at ¶ 147.

Catholic Charities also supports a pregnancy and parenting support program. In 2012, 2,545 parents utilized the services. Stipulations of Fact, ¶ 149. Catholic Charities also maintains crisis pregnancy assistance and post-abortion healing ministries and offers post-abortion healing retreats. Stipulations of Fact, ¶¶ 138-41.

b. Erie

The Diocese of Erie, through its supported social services organizations, provides aid to approximately 56,000 people per year, including many who would otherwise not receive necessary food, shelter, and other services. Stipulations of Fact, ¶¶ 75-76; Doc. No. 1, ¶¶ 33-34. Residents of Northwestern

Pennsylvania are served by the Diocese's prison, family, and disability ministries, as well as respect life organizations, and pregnancy and new mother services. Stipulations of Fact, ¶¶ 69-70. The Diocese also financially supports numerous secular and religious charities including: St. Elizabeth Center (food pantry and thrift and clothing store); the Good Samaritan Center (homeless shelter and emergency assistance provider); Better Homes for Erie (provider of affordable low-income housing); and Catholic Charities Counseling and Adoption Services (provider of professional, adoption, and pregnancy counseling and refugee resettlement services). Stipulations of Fact, ¶¶ 70-74.

Other Diocese affiliated organizations include Plaintiffs: St. Martin Center and Prince of Peace Center. Doc. No. 1, ¶¶ 41, 47 St. Martin Center is a nonprofit social service organization based in Erie that provides individuals and families with resources to become self-sufficient. Stipulations of Fact, ¶ 79; Doc. No. 1, ¶ 41. The Center is an affiliated corporation of the Diocese, which directly oversees its management. Doc. No. 1, ¶ 46. Services provided include social services, a food pantry, housing services, an early learning center, a job preparation program, and hospitality industry training. Stipulations of Fact, ¶¶ 88-93; Doc. No. 1, ¶ 46. The Center does not qualify as a "religious employer" as defined by the exemption to the contraceptive mandate. Doc. No. 1, ¶ 45.

Prince of Peace Center is a nonprofit social service organization which provides various social services to the needy of greater Mercer County who do not receive all of their necessities from the Government.

Stipulations of Fact, ¶ 78; Doc. No. 1, ¶¶ 47, 50. The Center is an affiliated corporation of the Diocese, which directly oversees its management. Doc. No. 1, ¶ 53. Services provided include family support services, emergency assistance programs (funded by private donations), a thrift store, workforce preparation, a soup kitchen (serves approximately 700 individuals a month with groceries to supplement food stamps and 5,700 people per year at the soup kitchen), job preparation programs, computer classes, and various programs and charity drives. Stipulations of Fact ¶¶ 80-87; Doc. No. 1, ¶ 48. The Center does not qualify as a "religious employer" as defined by the exemption to the contraceptive mandate. Doc. No. 1, ¶ 52.

The majority of the individuals served by St. Martin Center and Prince of Peace Center live below the poverty line and would be without food, shelter, and necessary services if not for the Centers. Stipulations of Fact, ¶ 94. The Diocese would not be able to provide all of the social services offered, including at St. Martin Center and Prince of Peace Center, without financial contributions from donors and volunteers. Stipulations of Fact, ¶¶ 77, 95.

Bishop Persico serves as Chairman for the membership boards of the St. Martin Center and Prince of Peace Center. Declaration of Mary Maxwell (P-90), ¶ 3. Both Centers are "required to adhere to Catholic doctrine at all times and in all manners," particularly as defined by the Diocese. *Id.* Bishop Persico is responsible for carrying out that doctrine and implementing the Centers' missions. Declaration of Father Scott Detisch, Ph.D. (P-92), ¶ 5. As such, he is ultimately responsible for ensuring that all of

the Centers' policies comply with Catholic doctrine. *Id.* at ¶ 6.

Failure to adhere to the contraceptive mandate, as applied via the "accommodation," could subject St. Martin Center and Prince of Peace Center to "several million" dollars in collective fines against budgets of four million dollars and $800,000.00, respectively. Hearing Testimony, Mary Maxwell, pg. 115, lines 9, 11-13, 16.

E. Plaintiffs' Employee Health Insurance Coverage

1. Religious Components of Employee Health Care

The sanctity of human life from conception to natural death and the dignity of all persons are central tenets of the Catechism of the Catholic Church. Hearing Testimony, Bishop Persico, pg. 75, lines 16-19. The Catholic Church believes that health care is a basic right because of the sanctity and dignity of human life. *See* Cardinal Dolan Deposition (13-cv-303, Doc. No. 52; 13-cv-1459, Doc. No. 53), pg. 28, lines 19-23; Hearing Testimony, Bishop Zubik, pg. 38, lines 23-24; Hearing Testimony, Bishop Persico, pg. 73, lines 23-25; Declaration of Father Scott Detisch, Ph.D. (P-92), ¶ 25; Declaration of Father Ronald P Lengwin (P-88), ¶ 34.

The Catholic Church also believes that contraception and abortion are prohibited, and Catholics cannot facilitate/initiate, directly or indirectly, the provision of abortions. Cardinal Dolan Deposition (13-cv-303, Doc. No. 52; 13-cv-1459, Doc. No. 53), pg. 25, lines 15-19, 23-25, pg, 26, lines 1-12; Hearing Testimony, Bishop Zubik, pg. 28, lines 16-22; Declaration of Father Ronald P Lengwin (P-88),

¶¶ 12-13; Plaintiffs' Exhibit 2 "Ethical and Religious Directives for Catholic Health Care Services, United States Conference of Catholic Bishops November 17, 2009," ¶¶ 45, 52 ("Abortion (that is, the directly intended termination of pregnancy before viability or the directly intended destruction of a viable fetus) is never permitted. Every procedure whose sole immediate effect is the termination of pregnancy before viability is an abortion, which, in its moral context, includes the interval between conception and implementation of the embryo. Catholic health care institutions are not to provide abortion services, even based upon the principle of material cooperation. In this context, Catholic health care institutions need to be concerned about the danger of scandal[15] in any association with abortion providers.").

This belief necessarily prohibits providing, subsidizing, initiating, or facilitating insurance coverage for abortion-inducing drugs, sterilization services, contraceptives, and related educational and counseling services. Declaration of Father Ronald P. Lengwin (P-88), ¶ 10; Plaintiffs' Exhibit 2, pg. 28, ¶ 52 ("Catholic health institutions may not promote or condone contraceptive practices but should provide, for married couples and the medical staff who counsel them, instruction both about the Church's teaching on responsible parenthood and in the methods of natural family planning.").

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[15] Per testimony, "scandal," within the Catholic faith, means cooperating with an objectionable practice that goes against the faith, or "teaching one thing and behaving in another manner." Hearing Testimony, Bishop Zubik, pg. 35, lines 20-23; Hearing Testimony, Bishop Persico, pg. 81, lines 18-20.

2. Diocese of Pittsburgh and the Catholic Benefits Trust (Self-Insured Health Plan) – Doc. No. 1, ¶¶ 34-40

The Diocese of Pittsburgh provides health insurance to its employees through a self-insured health plan through the Catholic Benefits Trust ("Trust"). Declaration of David S. Stewart (P-87), ¶ 4. The Trust was formed in June 2013 by an agreement between the Diocese of Pittsburgh, the Diocese of Altoona-Johnstown, and the Diocese of Greensburg (the "Trust Agreement"), in an effort to pool resources with regard to health benefits. Stipulations of Fact, ¶ 133. The Trust was formed by the Diocese of Pittsburgh converting its Catholic Employers Benefits Plan Delaware Trust to a Delaware statutory trust and expanding the Trust to include the Dioceses of Altoona-Johnstown and Greensburg. Doc. No. 1, ¶ 34.

The three Dioceses are the Beneficial Owners of the Trust, which is split into three series: the Pittsburgh series, the Altoona-Johnstown series, and the Greensburg series. Each Diocese is the sole "Beneficial Owner" and sole beneficiary of its respective series. Thus, Plaintiff Diocese of Pittsburgh is the sole Beneficial Owner and sole beneficiary of the Pittsburgh series of the Trust. Declaration of David S. Stewart (P-87), ¶ 5.

The Diocese itself provides health insurance coverage to approximately 200 individuals who are its direct employees and their beneficiaries. Declaration of David S. Stewart (P-87), ¶ 6. The offered plans are self-insured through the Catholic Benefits Trust and administered by TPAs. *Id.*

Consistent with the teachings of the Catholic Church, all of the Diocesan plans offered through the Trust, including those for its nonprofit, religious affiliated/related organizations, such as Catholic Charities, do not cover abortion-inducing drugs, contraceptives, or sterilization, except when medically necessary. Declaration of Susan Rauscher (P-86), ¶ 19; Declaration of David S. Stewart (P-87), ¶ 9. In the past, the Diocese has notified its TPAs that it would not cover contraceptive products, services, and counseling. Declaration of David S. Stewart (P-87), ¶ 14.

The Catholic Benefits Trust also provides coverage to "Diocesan Entit[ies]," defined in the Trust Agreement as "an Agency, Parish, School, seminary or other similar entity subject to the supervision, or administrative and pastoral care, of a Diocese." Stipulations of Fact, ¶ 134; Doc. No. 1, ¶ 36. Presently, approximately 230 Catholic organizations, including the Diocese of Pittsburgh, Catholic Charities, all of the parishes and schools with the Diocese, and several other entities affiliated with the Diocese of Pittsburgh, along with the Dioceses of Altoona-Johnstown and Greensburg and affiliated entities within those Dioceses, participate in the Trust. Within these organizations, approximately 3,100 employees and 5,000 participants receive their health insurance through the Trust. This structure allows organizations to benefit from "economies of scale," to be self-insured, and to spread their risks. As a result, each religious organization can offer its employees better benefits at lower costs. Doc. No. 1, ¶ 36.

The three Dioceses do not contract with a separate insurance company that pays for the employee health plans sponsored by the Trust. Instead, the Trust functions as the insurance company underwriting the covered employee's medical costs, with all funding coming from each respective Diocese and its covered affiliates. The health plans sponsored by the Trust are administered by TPAs, who are paid a flat fee for each covered individual for administering the plans but who do not pay for any services received by covered employees. The Trust sponsors one set of group health plans for the Diocese of Pittsburgh and the majority of Diocesan-affiliated entities within the Diocese of Pittsburgh (the "Diocesan Health Plan"). Doc. No. 1, ¶ 39.

The Diocesan health plans offered – except to Catholic Charities – are "grandfathered" and therefore are exempt from the requirements of the contraceptive mandate. Doc. No. 1, ¶ 166. The Diocese has included a statement describing its "grandfathered" status in plan materials, as required by 26 C.F.R. §54.9815-1251T(a)(2)(ii). *Id.*

The Trust sponsors separate group health plans for Plaintiff Catholic Charities of the Diocese of Pittsburgh. Catholic Charities provides health insurance coverage to approximately 80 full-time employees and their dependents (300 individuals). Declaration of Susan Rauscher (P-86), ¶ 7. The plan offered to employees of Catholic Charities is not a "grandfathered" health plan, and as such, it did not include a statement describing its "grandfathered" status in plan materials, as required by 26 C.F.R. § 54.9815-1251T(1)(ii) for "grandfathered" plans. Doc. No. 1, ¶ 44; Declaration of David S. Stewart (P-

87), ¶ 10.[16] The next Diocesan Health Plan year begins on January 1, 2014. Declaration of Susan Rauscher (P-86), ¶¶ 7-10; Declaration of David S. Stewart (P-87), ¶ 12. Many Diocesan-affiliated entities currently insured through the Trust likely do not qualify for the religious employer exemption and would be subjected to the accommodation after that date. Doc. No. 1, ¶ 44.

3. Trust Agreement – *See* Doc. No. 1, ¶¶ 47-50

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[16] The distinction between plans that are "grandfathered" and those that are not is important because as defined in federal regulations, plans that are "grandfathered" do not have to provide coverage without cost sharing of "preventive health services." 45 C.F.R. § 147.140; 26 C.F.R. § 54.9815-125T; and 29 C.F.R. § 2590.7151251. A plan is "grandfathered" if: (1) at least one person was enrolled on March 23, 2010; (2) the plan continuously covered at least one individual since that date; (3) the plan provides annual notice of its grandfathered status; and (4) the plan has not been subject to significant changes as outlined in the regulations. *See* 42 U.S.C. § 18011; 26 C.F.R. §§54.9815-1251T(a), (g); 29 C.F.R. §§ 2590.715-1251(a), (g); 45 C.F.R. §§ 147.140(a)(g). A plan may maintain its grandfathered status so long as, if, compared to its existence on March 23, 2010, it does not: eliminate all or substantially all benefits to diagnose or treat a particular condition; increase a percentage cost-sharing requirement; significantly increase a fixed-amount cost-sharing requirement; significantly reduce the employer's contribution; or impose or tighten an annual limit on the dollar value of any benefits. Additional Stipulated Facts, ¶ 3, citing 26 C.F.R. § 54.9815-1251T(a), (g)(1); 29 C.F.R. § 2590.715-1251(a), (g)(1); 45 C.F.R. § 147.140(a), (g)(1).

In July 2013, the Government announced that it will provide an additional year before the ACA mandatory employer and insurer reporting requirements begin. Plaintiffs' Exhibit 93, Doc. No. 63-1, pg, 2. As of February 2012, 1,200 employers had been granted waivers for certain coverage requirements. *Id.*

The Trust Agreement provides that "each Director" of the Board of Directors of the Trust shall be "appointed by the Bishop of each Diocese that is or becomes a Beneficial Owner" of the Trust. The Board of Directors is then responsible for "[t]he management of the Trust[.]"

While "all powers to manage the business and affairs of the Trust and each Series shall be exclusively vested in the Board and the Board may exercise all powers of the Trust[,]" "a majority of the Beneficial Owners may amend [the Trust] Agreement in writing at any time and thereby broaden or limit the Board's power and authority[.]" The Diocese, through the Bishop, has ultimate decision-making authority and has the power to manage, oversee, and direct the Trust. Doc. No. 1, ¶ 46.

Additionally, the Diocese decides whether an entity may participate in the Trust. The Trust Agreement provides that "[e]ach Beneficial Owner may allow such Diocesan Entities to benefit in such Series in respect of which such Beneficial Owner is the holder of the sole interest in accordance with the terms and conditions established by such Beneficial Owner in consultation with its advisors." The Diocese, as sole beneficial owner, also is responsible for the liability and other costs of the Trusts – "[a] particular Series shall be charged with the liabilities of that Series, and all expenses, costs, charges and reserves attributable to any particular Series shall be borne by such Series." Doc. No. 1, ¶ 50.

4. Diocese of Erie

The Diocese of Erie operates a self-insured health plan ("the Diocesan health plan") by which it functions as the insurance company in underwriting

the medical costs of its employees and the employees of its affiliated organizations. Doc. No. 1, ¶ 36. As such, the Diocese does not contract with a separate health insurance company. *Id.* The Diocesan health plan is administrated by a TPA. *Id.* The plan provides benefits for approximately 774 employees and 980 individuals, including those who are employed directly by the Diocese as well as by schools and charitable agencies of the Diocese (approximately 280 insured employees are employed by nonexempt entities). Declaration of David Murphy (P-91), ¶¶ 6, 27. Employees of St. Martin Center, Prince of Peace Center, and Erie Catholic (approximately 90 employees) are insured under the Diocesan health plan. *Id.* at ¶¶ 43, 51, 63; Declaration of Father Scott Jabo (P-89), ¶ 5.

Employees, regardless of the specific employer within the plan, are provided three options for health plans. Declaration of David Murphy (P-91), ¶ 18. Consistent with the tenets of the Catholic faith, none of these plans cover abortion-inducing drugs, contraceptives, or sterilization, except when "medically necessary." Declaration of David Murphy (P-91), ¶ 40. The Diocese has previously notified its TPA that it would not cover contraceptive products, services, and counseling, and has never designated the TPA to provide those products, services, or counseling. Declaration of David Murphy (P-91), ¶ 15. Such actions never triggered the provision of contraceptive products, services, or counseling. *Id.*

The next administrative year for the health plan (the date which all benefits for the July 1, 2014, plan year must be implemented) begins on January 1, 2014. Declaration of David Murphy (P-91), ¶¶ 9, 25.

The plan does not meet the ACA's definition of a "grandfathered" plan and therefore is not exempt from provisions of the ACA. Declaration of David Murphy (P-91), ¶ 9. As such, the Diocesan health plan must comply with the provisions of the ACA on or before January 1, 2014 (after the safe harbor provision has elapsed and first date of next administrative year for the plan). *Id.*

F. Plaintiffs' Religious Beliefs as to the Contraceptive Mandate

As previously noted, a tenet of the Catholic faith is the belief that human life must be preserved from conception through natural death. *See generally* Hearing Testimony, Bishop Zubik, pg. 28, lines 16-20.

The ACA includes the provision that eight categories of preventative services for women must generally be covered by group health plans without cost sharing. Additional Stipulated Facts, ¶ 15, citing HRSA, *Women's Preventive Services Guidelines* (Aug. 1, 2011), available at http://www.hrsa.gov/womensguidelines; 13-cv-303, Doc. No. 54-49; 13-cv-1459, Doc. No. 55-49. Plaintiffs object to only one of the eight categories, "contraceptive methods and counseling," that covers FDA approved "contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." Additional Stipulated Facts, ¶¶ 16-17 Plaintiffs object to the "contraceptive methods and counseling" category because such products, services, and counseling violate their belief in the sanctity of human life. *See generally* Hearing Testimony, Bishop Zubik, pg. 28, lines 16-20.

Completing the self-certification form required by the contraceptive mandate's "accommodation" also violates that tenet. Hearing Testimony, Bishop Zubik, pg. 33, lines 19-21 (" we are being asked to violate a tenet or belief that's important to us and a matter of conscience."). Completing the self-certification also would burden the signer's exercise of religion. Hearing Testimony, Mary Maxwell, pg. 113, lines 15-17.

Completion of the self-certification form would be akin to cooperating with/facilitating "an evil" and would place the Diocese "in a position of providing scandal" because "it makes it appear as though [the Diocese] is cooperating with an objectionable practice that goes against [Church] teaching." Hearing Testimony, Bishop Zubik, pg. 35, lines 17-18, 20-23, pg. 37, lines 7-9; Hearing Testimony, Bishop Persico, pg. 79, lines 24-25, pg. 80, lines 6-8; Hearing Testimony, Father Jabo, pg. 96, lines 4-5. Completing the self-certification form would violate personal religious beliefs and cause "eternal" "ramifications." Hearing Testimony, Father Jabo, pg. 97, lines 2-4; Hearing Testimony, Bishop Persico, pg. 81, line 25.

Bishop Zubik will not complete the self-certification form and would instruct the head of Catholic Charities not to complete the self-certification form. Hearing Testimony, Bishop Zubik, pg. 43, lines 2-10. Bishop Persico stated: "I would have a real moral issue in signing [the self-certification form] because I would be afraid of giving scandal to the faithful" and "I would have a very difficult time in [directing the heads of St. Martin Center, Prince of Peace Center, or Erie Catholic to

complete the self-certification form]. I don't see how I could." Hearing Testimony, Bishop Persico, pg. 80, lines 1-8, pg. 82, lines 14-16, pg. 91, lines 7-9.

III. Statutory and Regulatory History

The applicable statutory and regulatory history, as set forth by the parties in the Stipulations of Fact (¶¶ 1-49) and Addition Stipulations of Fact (as cited), is:

A. Introduction

In March 2010, Congress enacted the ACA. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), and the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

The ACA established new requirements for "group health plan[s]," broadly defined as "employee welfare benefit plan[s]" within the meaning of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1002(1), that "provide[] medical care to employees or their dependents." 42 U.S.C. § 300gg-91(a)(1).

Section 1001 of the ACA requires all group health plans and health insurance issuers that offer non-grandfathered, non-exempt group or individual health coverage to provide coverage for certain preventive services without cost-sharing, including, "[for] women, such additional preventive care and screenings as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [("HRSA")]." 42 U.S.C. § 300gg-13(a)(4).

The ACA provides that certain of its provisions apply to "grandfathered health plans" and certain of

its provisions, including 42 U.S.C. § 300gg-13, do not apply to "grandfathered health plans." 42 U.S.C. § 18011. The contraceptive mandate does not apply to qualifying "grandfathered" plans, and such plans are not required to comply with the preventive services coverage requirement of 42 U.S.C. § 300gg-13. Additional Stipulated Facts, ¶¶ 1-2.

B. Regulatory Background

1. Rulemaking from July 2010 to March 2012

On July 19, 2010, Defendants issued interim final rules, incorporating the statutory requirement that group health plans provide coverage for women's "preventive care." 75 Fed. Reg. 41,726 (citing 42 U.S.C. § 300gg-13(a)(4)). These initial rules did not define "preventive care," noting that "[t]he Department of HHS is developing these guidelines and expects to issue them no later than August 1, 2011." *Id.* at 41,731. At that time, there were no existing HRSA guidelines relating to preventive care and screening for women.

The Department of Health and Human Services ("HHS") tasked the Institute of Medicine ("IOM"), a non-governmental organization, with "review[ing] what preventive services are necessary for women's health and well-being and should be considered in the development of comprehensive guidelines for preventive services for women." IOM Report at 2. On July 19, 2011, the IOM Committee released a report entitled "Clinical Preventive Services for Women: Closing the Gaps 19-20, 109 (2011) ("IOM Report"). The IOM Report recommended that the HRSA guidelines include, among other things, "the full range of [FDA]-approved contraceptive methods,

sterilization procedures, and patient education and counseling for women with reproductive capacity" ("Preventive Services"). IOM Report at 10-12. FDA-approved contraceptive methods include diaphragms, oral contraceptive pills, emergency contraceptives (such as Plan B and Ella), and intrauterine devices ("IUDs"). *See id.* at 105. The IOM Report included a dissent from Committee member Anthony Lo Sasso.

On August 1, 2011, HHS issued a press release announcing that it would adopt the recommendations of the IOM Report. U.S. Dept. of Health and Human Services, "Affordable Care Act Ensures Women Receive Preventive Services at No Additional Cost," *available at* http://www.hhs.gov/news/press/2011pres/08/20110801b.html.

Also, on August 1, 2011, HRSA adopted guidelines consistent with IOM's recommendations, encompassing all FDA-approved "contraceptive methods, sterilization procedures, and patient education and counseling," as prescribed by a health care provider, subject to an exemption relating to certain religious employers authorized by regulations issued that same day (the "2011 amended interim final regulations"). *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines").

In August 2011, the Government issued interim final rules implementing the statutory requirement that group health plans provide coverage for women's "preventive care and screenings as provided for in comprehensive guidelines supported by [HRSA]." 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011).

The August 2011 interim final rules also amended the July 19, 2010 interim rules to provide HRSA

additional discretion to exempt "religious employers" from the contraceptive coverage requirement. *Id.* To qualify for the religious employer exemption contained in the 2011 amended interim final regulations, an employer had to meet the following criteria:

a. The inculcation of religious values is the purpose of the organization;

b. The organization primarily employs persons who share the religious tenets of the organization;

c. The organization serves primarily persons who share the religious tenets of the organization; and

d. The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended [*i.e.*, an organization exempted from filing IRS Form 990].

Id. at 46,623. The Government sought "to provide for a religious accommodation that respects the unique relationship between a house of worship and its employees in ministerial positions." *Id.*

In February 2012, the Government "finalize[d], without change," the "religious employer" exemption as originally proposed in the August 2011 interim final rules. 77 Fed. Reg. at 8,729 (Feb. 15, 2012). In February 2012, the Government also created a "one-year safe harbor from enforcement" for non-grandfathered group health plans sponsored by certain nonprofit organizations with religious objections to contraceptive coverage. *See* 77 Fed.

Reg. 8725, 8726-28 (Feb. 15, 2012). The Government undertook a new rulemaking during the safe harbor period to adopt new regulations applicable to non-grandfathered nonprofit religious organizations with religious objections to covering Preventive Services. *Id.* at 8728.

On March 21, 2012, the Government issued an Advance Notice of Proposed Rulemaking ("ANPRM") that stated it was part of the Government's effort "to develop alternative ways of providing contraceptive coverage without cost sharing in order to accommodate non-exempt, nonprofit religious organizations with religious objections to such coverage." 77 Fed. Reg. 16,501, 16,503 (Mar. 21, 2012).

2. Rulemaking from February to July 2013

On February 1, 2013, the Government issued a Notice of Proposed Rulemaking ("NPRM"), setting forth a proposal that stated it was to "amend the criteria for the religious employer exemption to ensure that an otherwise exempt employer plan is not disqualified because the employer's purposes extend beyond the inculcation of religious values or because the employer serves or hires people of different religious faiths," and to "establish accommodations for health coverage established or maintained by eligible organizations, or arranged by eligible organizations that are religious institutions of higher education, with religious objections to contraceptive coverage." *See* 78 Fed. Reg. 8456 (Feb. 6, 2013).

Defendants received over 400,000 comments (many of them standardized form letters) in response to the

proposals set forth in the NPRM. 78 Fed. Reg. 39,870, 39,872 (July 2, 2013).

On June 28, 2013, the Government issued final rules adopting and/or modifying proposals in the NPRM. *See* 78 Fed. Reg. 39,870 ("Final Rule"). The regulations challenged here (the "2013 final rules") include the new regulations issued by the Government and applicable to non-grandfathered, nonprofit religious organizations with religious objections to covering Preventive Services. *See* 78 Fed. Reg. 39,870; *see also* 77 Fed. Reg. 16,501 (ANPRM); 78 Fed. Reg. 8456 (NPRM).

a. The 2013 Final Rules' "Religious Employer" Exemption

The Final Rule states that it "simplify[ied] and clarify[ied] the definition of "religious employer." 78 Fed. Reg. at 39,871. Under the new definition, an exempt "religious employer" is "an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 78 Fed. Reg. 39874 (codified at 45 CFR § 147.131(a)). The groups that are "refer[red] to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code," are:

> (i) churches, their integrated auxiliaries, and conventions or associations of churches, and
>
> * * *
>
> (iii) the exclusively religious activities of any religious order.

26 U.S.C. § 6033(a)(3)(A)(i) or (iii). Section 6033 of the Internal Revenue Code addresses whether and when nonprofit entities that are exempt from paying taxes under the Code must file "annual information [tax] return[s]." 26 C.F.R. § 1.6033-2(a).

The new definition of "religious employer" does "not expand the universe of religious employers that qualify for the exemption beyond that which was intended in the 2012 final regulations." 78 Fed. Reg. at 39,874 (citing 78 Fed. Reg. 8461). Entities that are included in Section 6033(a)(3)(A) are exempt from filing an annual Form 990 with the IRS.[17]

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[17] The IRS has developed a non-exhaustive list of fourteen facts and circumstances that may be considered, in addition to "any other facts and circumstances that may bear upon the organization's claim for church status," in assessing whether an organization is a "church" under section 6033(a)(3)(A)(i) of the Internal Revenue Code. *See Foundation of Human Understanding v. United States*, 88 Fed. Cl. 203, 220 (Fed. Cl. 2009); Internal Revenue Manual 7.26.2.2.4. The list of fourteen facts and circumstances includes the following:

(1) a distinct legal existence;

(2) a recognized creed and form of worship;

(3) a definite and distinct ecclesiastical government;

(4) a formal code of doctrine and discipline;

(5) a distinct religious history;

(6) a membership not associated with any church or denomination;

(7) an organization of ordained ministers;

(8) ordained ministers selected after completing prescribed studies;

(9) a literature of its own;

(10) established places of worship;

(11) regular congregations;

The 2013 final rules' amendments to the religious employer exemption apply to group health plans and

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(12) regular religious services;

(13) Sunday schools for the religious instruction of the young; and

(14) schools for the preparation of its ministers.

Id.

In 26 C.F.R. § 1.6033-2(h), the Treasury Regulations provide a 3-factor test to determine whether a group is an "integrated auxiliary" under section 6033(a)(3)(A)(i) of the Internal Revenue Code. According to the Treasury Regulation, the term "integrated auxiliary of a church" means an "organization that is: (i) [d]escribed in both sections 501(c)(3) and 509(a)(1), (2), or (3); (ii) [a]ffiliated with a church or a convention or association of churches; and (iii) [i]nternally supported." 26 C.F.R. § 1.6033-2(h)(1).

An organization is "internally supported" for purposes of subparagraph (h)(1)(iii), above, of this section, unless it both,

(i) Offers admissions, goods, services or facilities for sale, other than on an incidental basis, to the general public (except goods, services, or facilities sold at a nominal charge or for an insubstantial portion of the cost); and

(ii) Normally receives more than 50 percent of its support from a combination of governmental sources, public solicitation of contributions, and receipts from the sale of admissions, goods, performance of services, or furnishing of facilities in activities that are not unrelated trades or businesses.

An entity's eligibility for exemption as a religious employer is determined on an employer-by-employer basis. *See* 78 Fed. Reg. at 39,886.

An entity that offers a health plan to its employees that is administered by a qualified religious employer must independently qualify for the religious employer exemption to be exempt. 78 Fed. Reg. 39,886; *see also* 78 Fed. Reg. at 8456, 8463.

group health insurance issuers for plan years beginning on or after August 1, 2013. *See id.* at 39,871.

b. The 2013 Final Rules' "Accommodation"

The 2013 final rules establish regulations regarding the contraceptive coverage requirement for group health plans established or maintained by "eligible organizations." 78 Fed. Reg. at 39,875-80; 45 C.F.R. § 147.131(b).

An "eligible organization" is an organization that satisfies the following criteria:

> (1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.
>
> (2) The organization is organized and operates as a nonprofit entity.
>
> (3) The organization holds itself out as a religious organization.
>
> (4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies.

45 C.F.R. § 147.131(b); *see also* 78 Fed. Reg. at 39,874-75. The 2013 final rules state that an eligible organization is not required "to contract, arrange,

pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874.

To be relieved of the obligations that otherwise apply to non-grandfathered, non-exempt employers, the 2013 final rules require that an eligible organization complete a self-certification form, certifying that it is an eligible organization, sign the form, and provide a copy of that self-certification to its insurer or TPA. *Id.* at 39,878-79.

For self-insured organizations, the self-certification "will afford the [TPA] notice of [its] obligations" under the 2013 final rules, "and will be treated as a designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits pursuant to section 3(16) of ERISA." 78 Fed. Reg. at 39,879. Section 3(16) of ERISA provides the definition of "administrator" under ERISA. 29 U.S.C. § 1002(16).

Under the 2013 final rules, in the case of an eligible organization with a self-insured group health plan, the organization's TPA, upon receipt of the self-certification, will provide or arrange separate payments for contraceptive services for participants and beneficiaries in the plan without cost-sharing, premium, fee, or other charge to plan participants or beneficiaries, or to the eligible organization or its plan. *See id.* at 39,879-80; 26 C.F.R. § 54.9816-2713A(b)(2), (c)(2).

Under the 2013 final rules, costs incurred by TPAs relating to the coverage of Preventive Services for employees of eligible organizations will be reimbursed through an adjustment to Federally-facilitated Exchange (FFE) user fees. *See* 78 Fed. Reg. at 39,880. The payments for Preventive

Services required by the challenged regulations applicable to employer-sponsored health insurance plans are available to an employee only while the employee is on an organization's health plan. 29 C.F.R. § 2590.715-2713; 45 C.F.R. § 147.131(c)(2)(i)(B).

Self-insured religious employers and eligible organizations are prohibited from "directly or indirectly, seek[ing] to influence the[ir] third party administrator's decision" to provide or procure Preventive Services. 26 C.F.R. § 54.9815–2713.

The 2013 final rules' "accommodation" applies to group health plans and health insurance issuers for plan years beginning on or after January 1, 2014. *See id.* at 39,872.

IV. Summation of Findings of Fact

Based upon testimony presented at the Injunction Hearing, credibility determinations of the witnesses by this Court, and the sum of evidence presented in various forms, the Court finds in summary that:

(1) Plaintiffs hold sincerely to the religious beliefs of the Catholic faith that:

(a) human life is sacred from conception to natural death;

(b) worship, faith, and good works are essential and integral to the practice of Catholicism ("faith without good works is dead"); and

(c) the facilitation of evil is as morally odious as the proliferation of evil.

(2) Plaintiffs will refuse to provide, directly or indirectly, employee health insurance

coverage for contraceptive products, services, or counseling, because doing so would violate their sincerely-held religious beliefs.

(3) The nonprofit, religious affiliated/related Plaintiffs (Catholic Charities, St. Martin Center, Prince of Peace Center, and Erie Catholic) will not complete the self-certification form. These Plaintiffs will partake in this act of civil disobedience because to do otherwise – meaning signing the self-certification form – will initiate ("cause a process of action to begin") and facilitate coverage of contraceptive products, services, and counseling by a TPA or health insurer. The act of signing the self-certification form will violate these Plaintiffs' sincerely-held religious beliefs. Hearing Transcript, November 13, 2013, pg. 54, lines 23-25, pg. 55, lines 1-9. Further, the Bishops will direct these Plaintiffs not to complete the self-certification form. Hearing Testimony, Bishop Zubik, pg. 43, lines 2-10; Hearing Testimony, Bishop Persico, pg. 80, lines 1-8, pg. 82, lines 14-16, pg. 91, lines 7-9.

(4) The nonprofit, religious affiliated/related Plaintiffs will be subject to substantial fines/penalties/"taxes" and other coercive governmental sanctions.

(5) The effect of the imposition of these fines/penalties/taxes" will gravely impact Plaintiffs' spiritual, charitable, and educational activities, and the individuals who rely on the Catholic Church's nonprofit, religious affiliated/related organizations for

> the basic needs of food, shelter, and education, as well as other charitable programs. Cardinal Dolan Deposition, (13-cv-303, Doc. No. 52; 13-cv-1459, Doc. No. 53), pg. 29, lines 5-21. The fines/penalties/taxes" also will negatively affect Plaintiffs' financial situation as donors to these spiritual/charitable/educational organizations may not wish to donate funds when the funds could be diverted to the Government in the form of fines/penalties/taxes."

V. Conclusions of Law

A. Overview

As far as this Court is aware, the facts presented by these two cases make them one of first-impression. As of this writing, no appellate court has rendered a decision on the merits of a non-secular, nonprofit organization's rights under the RFRA, as impacted by the ACA's contraceptive mandate, and the "religious employer exemption" and "accommodation" which relate to that mandate.[18]

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[18] In *Liberty University, Inc. v. Lew*, 733 F.3d 72 (4th Cir. 2013), the Court of Appeals upheld the constitutionality of two provisions of the ACA – the "individual mandate," which requires individuals to purchase a minimum level of health insurance coverage, and the "employer mandate," which requires certain employers to offer such coverage to their employees and their dependents. Following a remand by the United States Supreme Court, and while on appeal to the Court of Appeals for the Fourth Circuit, Liberty University, for the first time, challenged as abortifacients all forms of FDA-approved contraception that "may act after fertilization," including emergency contraceptive pills and intra-uterine devices. 733 F.3d at 103. Because this claim had never been raised before, the Court of Appeals refused to "consider an issue

In reaching its decision in these two cases, this Court has found the recent decisions pertaining to secular, for-profit organizations to be instructive. *See Korte v. Sebelius*, — F.3d —, 2013 WL 5960692 (7th Cir. Nov. 8, 2013) (granting preliminary injunction to secular, for-profit corporations finding them to be "persons" who could assert claims under the RFRA alleging that the ACA's contraceptive mandate placed substantial burden on their exercise of religion); *Gilardi v. U.S. Dept. Health and Human Services*, — F.3d —, 2013 WL 5854246 (C.A. D.C. Nov. 1, 2013) (holding secular, for-profit entity was not a "person" capable of religious exercise, but individual owners were); *Conestoga Wood Specialties Corporation v. Secretary of U.S. Dept. of Health and Human Services*, 724 F.3d 377 (3d Cir. July 26, 2013) (a secular, for-profit corporation could not assert claim under Free Exercise Clause of First Amendment); and *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. June 27, 2013) (in moving for a preliminary injunction, secular, for-profit

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not passed upon below" and declined to rule on the merits of this claim. *Id.* Thus, assuming Liberty University is a non-secular, nonprofit educational institution, the appellate court did not reach the merits of its "contraceptive mandate" claim.

The Court further notes that there are other United States District Courts addressing whether the contraceptive mandate applies to non-secular, nonprofit organizations via the "accommodation." *See, i.e., Geneva College v. Sebelius*, — F.Supp.2d —, 2013 WL 3071481 (W.D. Pa. June 18, 2013) (granting preliminary injunction preliminary injunction to religious college, protecting it from complying the ACA's contraceptive mandate), notice of appeal filed, United States Court of Appeals for the Third Circuit, Case Number 13-2814; and the recently re-opened *East Texas Baptist University v. Sebelius*, Civil Action No. H–12–3009 (S.D. Tex).

corporations showed a substantial likelihood of success on the merits as to the substantial-burden element of their claim under the RFRA).

The Court begins its analysis by considering the four criteria Plaintiffs must prove in order to obtain a preliminary injunction.

B. Preliminary Injunction Test

The primary purpose of a preliminary injunction is to maintain the status quo until a decision on the merits of the case is rendered. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). "Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Id.*

"Four factors determine whether a preliminary injunction is appropriate: '(1) whether the movant has a reasonable probability of success on the merits; (2) whether the movant will be irreparably harmed by denying the injunction; (3) whether there will be greater harm to the nonmoving party if the injunction is granted; and (4) whether granting the injunction is in the public interest.'" *B.H. ex rel. Hawk v. Easton Area School Dist.*, 725 F.3d 293, 301-2 (3d Cir. 2013) (quoting *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 252 (3d Cir. 2002) quoting *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 170 (3d Cir. 2001)).

"A plaintiff seeking an injunction must meet all four criteria, as '[a] plaintiff's failure to establish any element in its favor renders a preliminary injunction inappropriate.'" *Conestoga Wood Specialties Corp. v. Secretary of U.S. Dept. of Health and Human Svcs.*,

724 F.3d 377, 382 (3d Cir. 2013) (quoting *NutraSweet Co. v. Vit–Mar Enters., Inc.*, 176 F.3d 151, 153 (3d Cir. 1999)); accord, *Duraco Products, Inc. v. Joy Plastic Enterprises, Ltd.*, 40 F.3d 1431, 1438 (3d Cir. 1994) ("The injunction should issue only if the plaintiff produces evidence sufficient to convince the district court that all four factors favor preliminary relief.").

As to the first criterion, the movant bears the burden of proving a reasonable probability of success on the merits. "[O]n an application for preliminary injunction, the plaintiff need only prove a *prima facie* case, not a certainty that he or she will win." *Highmark, Inc.*, 276 F.3d at 173, citing 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2948.3 (Civil 2d ed. 1995).

The second criterion requires the movant prove that "irreparable injury is likely in the absence of an injunction" – the mere "possibility" of such irreparable harm "is too lenient." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). "While the burden rests upon the moving party to make these [first] two requisite showings, the district court 'should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest.'" *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994), quoting *Delaware River Port Auth. v. Transamerican Trailer Transp., Inc.*, 501 F.2d 917, 919–20 (3d Cir. 1974) (footnote omitted).

In order to satisfy the third criterion, this Court must find "that the party seeking the injunction

would suffer more harm without the injunction than would the enjoined party if it were granted." *Pittsburgh Newspaper Printing Pressmen's Union No. 9 v. Pittsburgh Press Co.* 479 F.2d 607, 609-610 (3d Cir. 1973). In *Winter*, the Supreme Court of the United States noted that although it did "not question the seriousness of [the movant's] interests,

> the balance of the equities and consideration of the overall public interest in this case tip[ped] strongly in favor of the [non-moving party]." 555 U.S. at 26. Thus, this criterion requires this Court to employ a balancing test that compares the harms the movant and non-movant would suffer and then weighs them to discern which party would be more greatly harmed by the Court's grant or denial of the injunction.

The fourth and final criterion is closely tied to the third in that it requires this Court to determine if the public's interest will be furthered or harmed by the issuance of a preliminary injunction. *See Trefelner ex rel. Trefelner v. Burrell School Dist.*, 655 F.Supp.2d 581, 597-8 (W.D. Pa. 2009) ("With regard to the public interest prong, the court finds that granting the temporary restraining order is in the public interest. The focus of this prong is 'whether there are policy considerations that bear on whether the order should issue,'" citing 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE § 2948.4 (Civil 2d ed. 1995)). "'The grant or denial of a preliminary injunction is committed to the sound discretion of the district judge, who must balance all of these factors in making a decision.'" *Spartacus, Inc. v. Borough of McKees Rocks*, 694 F.2d 947, 949 (3d Cir. 1982), quoting *Penn Galvanizing Co. v. Lukens Steel Co.*, 468 F.2d 1021, 1023 (3d Cir. 1972).

Turning to the instant matter, Plaintiffs in these cases have requested that this Court grant them a preliminary injunction, arguing that the ACA and the religious employer "accommodation," which requires them to facilitate/initiate compliance with the contraceptive mandate, violates their rights under the RFRA and the Free Exercise Clause of the First Amendment.

1. Likelihood of Success on the Merits

a. Background

Plaintiffs' Motions for Expedited Preliminary Injunction ask this Court to enjoin the issuance, application, and enforcement of a federal regulation, specifically 45 C.F.R. § 147.130(a)(1)(iv), arguing that they are likely to succeed on their RFRA and First Amendment claims. 13-cv-1459, Doc. No. 4; 13-cv-303, Doc. No. 6.

As noted in Section "III. B. 2." above, 45 C.F.R. § 147.130(a)(1)(iv) is the regulation that allows HRSA to "establish exemptions" from group health plans maintained by "religious employers" with respect "to any requirement to cover contraceptive services[.]" *See* 45 C.F.R. § 147.130(a)(1)(iv)(A); *see also Gilardi, supra*, 2013 WL 5854246, *1 (C.A. D.C. Nov. 1, 2013).

After receiving hundreds of thousands of comments from the public, including religious individuals and entities, concerning the definition of "religious employer" for the benefit of receiving an "exemption" from the contraceptive mandate, the "final rule" promulgated by HRSA defined a "religious employer" as "an organization that is organized and operates as a nonprofit entity and is referred to in section

6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code " 45 C.F.R. § 147.131(a).

Again, as noted in Section "III. B. 2." above, the nonprofit entities included in the relevant portion of Section 6033 of the Internal Revenue Code are:

> (i) churches, their integrated auxiliaries, and conventions or associations of churches,
>
> * * *
>
> (iii) the exclusively religious activities of any religious order.

26 U.S.C.A. § 6033(a)(3)(A).

Given this description, Plaintiffs in the instant cases (the nonprofit, religious affiliated/related entities) fail to meet the definition of a "religious employer" entitled to the "exemption." As the United States Court of Appeals for the Seventh Circuit noted in *Korte*:

> The religious-employer exemption did not leave room for the conscientious religious objectors other than houses of worship, their integrated affiliate organizations, and religious orders acting as such. In other words the definition of 'religious employer' was so circumscribed that it left out religious colleges and universities; religious hospitals and clinics; religious charities and social-service organizations; other faith-based nonprofits; and for-profit, closely held businesses managed in accordance with a religious mission or creed.

Korte, 2013 WL 5960692, *3. Plaintiffs in the instant cases are akin to the *Korte* plaintiffs in that the instant Plaintiffs are entities to which the religious employer "exemption" does not apply. If HRSA had

stopped here, non-secular, nonprofit entities such as Plaintiffs would have been required to directly provide for contraceptive products, services, and counseling pursuant to the contraceptive mandate.

However, in response to concerns that the application of the religious employer "exemption" was too narrow, and instead of broadening the "exemption," a second regulation was enacted that allowed for non-secular, nonprofit employers to receive an "accommodation," whereby these entities could self-certify that they were "eligible organizations" and thereby avoid *directly* providing contraceptive products, services, and counseling.

As noted above, this "accommodation" is limited to "eligible organizations" which: (1) oppose providing coverage for some or all of any contraceptive services required to be covered under the contraceptive mandate "on account of religious objections[;]" (2) are organized and operate as a nonprofit entity; (3) hold themselves out as a religious organization; and (4) "self-certify," in a form and manner specified by the Secretary, that it satisfies the criteria in (1) through (3) above. *See* 45 C.F.R. § 147.131(b); *see also* 78 Fed. Reg. at 39,874-75. "The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974." *Id.*

Since the non-secular, nonprofit Plaintiffs in the instant cases meet the first three criteria of the "accommodation," they need to "self-certify," as required by the fourth criterion, to be deemed an

"eligible organization" and thus, entitled to obtain the religious employer "accommodation." It is the fourth criterion of the religious employer "accommodation" which Plaintiffs contend violates their rights under the RFRA and the First Amendment.[19]

In order to qualify for the religious employer "accommodation," and thus avoid *directly* providing or paying for contraceptive products, services, and counseling through their own health plans, Plaintiffs in these cases must self-certify that they: (1) oppose providing such contraceptive coverage on account of their religious objections; (2) are organized and operate as nonprofit entities; and (3) hold themselves out as a religious organization. This Court found as fact that Plaintiffs' self-certification forms must be executed by the Bishop of Pittsburgh (with respect to the Pittsburgh Plaintiffs in 13-cv-1459) and by the Bishop for the Diocese of Erie (with respect to the Erie Plaintiffs in 13-cv-303), or at their directive.

b. Substantial Burden[20] under RFRA

i. The RFRA

Plaintiffs assert that by requiring self-certification and thereby facilitating or initiating the process of providing contraceptive products, services, and

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[19] Notably, subpart "(c)" of same regulation provides that entities who meet all four criteria, thereby entitles them to an "accommodation," and will not have to pay for the contraceptive products, services, and counseling. A third party will. *See* 45 C.F.R. § 147.131(c).

[20] The Government declined to stipulate to the "substantial burden" portion of this test. 13-cv-303, Doc. No. 30, 4; 13-cv-1459, Doc. No. 25, 4.

counseling, via a third party, the "accommodation," violates their rights under the RFRA.

The RFRA provides, in pertinent part, as follows:

a) In general

> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--
>
> > (1) is in furtherance of a compelling governmental interest; and
> >
> > (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C.A. § 2000bb-1.

As noted by the Government, under the "substantial burden test," this Court must look to what is meant by "substantial burden" under the RFRA. As the Court of Appeals for the Seventh Circuit recently noted in *Korte*, "[a]t a minimum, a substantial burden exists when the government compels a religious person to 'perform acts undeniably at odds with fundamental tenets of [his] religious beliefs.'" 2013 WL 5960692 at *22, citing *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972). *Korte* further instructs that "a burden on religious exercise also arises when the government 'put[s] substantial

pressure on an adherent to modify his behavior and to violate his beliefs.'" *Id.*, citing *Thomas v. Review Bd. of Indiana Employment Sec. Division*, 450 U.S. 707, 718 (1981). "An inconsequential or *de minimis* burden on religious practice does not rise to this level, nor does a burden on activity unimportant to the adherent's religious scheme." *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (citing *Thomas*, 450 U.S. at 718 (1981)).

The Government argues that the "accommodation" merely requires the Pittsburgh and Erie Bishops (or their designees) to sign the self-certification form on behalf of their respective nonprofit, religious affiliated/related entities, and does not rise to the level of a "substantial burden," as that term has been defined in connection with the RFRA. The Government argues that any impact on Plaintiffs' sincerely-held religious beliefs created by Plaintiffs' self-certification is too attenuated to rise to the level of creating a substantial burden on Plaintiffs.

The Government acknowledges that the act of self-certification will require the Plaintiff-entities to sign the self-certification and supply a third party with the names of the Plaintiffs' respective employees so that the third-party may provide (and/or pay for) contraceptive products, services, and counseling. The Government also concedes that Plaintiffs have sincerely-held religious beliefs with respect to: (1) the sanctity of human life from conception to natural death; (2) unity of worship, faith, and good works ("faith without good works is dead"); and (3) the facilitation of evil is as morally odious as the proliferation of evil.

Given these concessions, the Court disagrees with the Government that Plaintiffs' ability or inability to "merely sign a piece of paper," and thus comport with the "accommodation," is all that is at issue here. Again, as stated by the Court of Appeals in *Korte*:

> the test for substantial burden does not ask whether the claimant has correctly interpreted his religious obligations. *See Lee*, 455 U.S. at 257; *Thomas*, 450 U.S. at 715–16. Indeed, that inquiry is prohibited. "[I]n this sensitive area, it is not within the judicial function and judicial competence to inquire whether the [adherent has] correctly perceived the commands of [his] faith. Courts are not arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716. It is enough that the claimant has an "honest conviction" that what the government is requiring, prohibiting, or pressuring him to do conflicts with his religion.

Korte at *22.

Here, the issue is whether Plaintiffs, being non-secular in nature, are likely to succeed on the merits of proving that their right to freely exercise their religion has been substantially burdened by the "accommodation" which requires the Bishops of two separate Dioceses (or their designees) to sign a form which thereby facilitates/initiates the provision of contraceptive products, services, and counseling.

ii. The "Accommodation" Creates a New Substantial Burden

The Government contends that the affirmative acts of: (1) signing the self-certification form stating Plaintiffs' religious objections; (2) compiling a list of

Plaintiffs' employees; and (3) providing those items to the health insurer or TPA, does not place a substantial burden on Plaintiffs. The Government further argues that these same acts have been undertaken by Plaintiffs in the past. In response, Plaintiffs concede that they have provided similar information in the past to their TPA, and that the physical acts themselves are not onerous. However, in the past, such actions barred the provision of contraceptive products, services, or counseling. Now, this type of information previously submitted to an insurer or TPA will be used to facilitate/initiate the provision of contraceptive products, services, or counseling – in direct contravention to their religious tenets.

Plaintiffs liken this result by analogy to a neighbor who asks to borrow a knife to cut something on the barbecue grill, and the request is easily granted. The next day, the same neighbor requests a knife to kill someone, and the request is refused. It is the reason the neighbor requests the knife which makes it impossible for the lender to provide it on the second day.

The same is true here. In all prior instances where the Government, an insurer, or a TPA has requested employee names or other information from Plaintiffs, the reason the information was sought was of no moment to Plaintiffs. Now, under the "accommodation," the reason the documentation is required is so that contraceptive products, services, and counseling can be provided in direct contravention of Plaintiffs' sincerely-held religious beliefs. The Government is asking Plaintiffs for documentation for what Plaintiffs sincerely believe is

an immoral purpose, and thus, they cannot provide it.

In sum, although the "accommodation" legally enables Plaintiffs to avoid directly paying for the portion of the health plan that provides contraceptive products, services, and counseling, the "accommodation" requires them to shift the responsibility of purchasing insurance and providing contraceptive products, services, and counseling, onto a secular source. The Court concludes that Plaintiffs have a sincerely-held belief that "shifting responsibility" does not absolve or exonerate them from the moral turpitude created by the "accommodation"; to the contrary, it still substantially burdens their sincerely-held religious beliefs.

iii. The "Accommodation" and the "Exemption" Divide the Catholic Church which Creates a Substantial Burden

The Government, by enacting the religious employer "exemption," allowed certain religious employers (*i.e.*, the Dioceses and "houses of worship") to freely exercise the religious belief that "contraception violates the sanctity of human life," by completely exempting them from the contraceptive mandate. Thus, the "exempt" religious employers do not have to directly provide contraceptive products, services, and counseling through their own health plans, nor do they have to provide a list of their employees to a third party and thereby indirectly provide contraceptive products, services, and counseling through that same third party. However,

the religious employer "accommodation" separates the "good works (faith in action) employers" from the "houses of worship employers" within the Catholic Church by refusing to allow the "good works employers" the same burden-free exercise of their religion.

Under the "accommodation," Plaintiffs here (*i.e.*, the "good works (faith in action) employers") will be forced to facilitate/initiate the provision of contraceptive products, services, and counseling, through a third party, despite the fact that the sincerity of their religious beliefs – "contraception violates the sanctity of human life" and "facilitation of evil is as morally odious as the proliferation of evil" – are not in question.

Simply put, the Court is constrained to understand why all religious employers who share the same religious tenets – (1) the sanctity of human life from conception to natural death; (2) unity of worship, faith, and good works ("faith without good works is dead"); and (3) the facilitation of evil is as morally odious as the proliferation of evil – are not exempt; or conversely, why all religious employers do not fall within the confines of the "accommodation." The Court made the factual determination that Plaintiffs sincerely believe that the "good works, or faith-in-action" arms of the Catholic Church implement a core and germane guiding principle in the exercise of their religious beliefs. Why should religious employers who provide the charitable and educational services of the Catholic Church be required to facilitate/initiate the provision of contraceptive products, services, and counseling, through their

health insurers or TPAs, when religious employers who operate the houses of worship do not?

To this question, the Government does not provide a direct answer. Rather, the Government takes the position that Plaintiffs cannot use the RFRA as a sword to prevent the Government from creating "alternate mechanisms" to essentially protect the rights of employees and to make sure that they are receiving the mandated health services. However, the Government, through its "exemption" regulation, allows the religious employers who operate the houses of worship to do just that, while denying the same benefit to the religious employers who operate on behalf of, and at the direction of, the Catholic Church.

What this Court finds equally problematic with the Government's position is that the Bishops of these two Dioceses may freely exercise those same three religious tenets referred to above, as long as they espouse them within the confines of a "house of worship." When they provide health insurance for the employees who work for the houses of worship, they are not in any moral danger of directly or indirectly providing contraceptive products, services, and counseling. However, these same two individuals, as the spiritual leaders for the Plaintiffs at issue in these cases, must personally take at least three affirmative actions (sign a self-certification form, compile a list of employees, and provide these to an insurer or TPA) in order to escape directly providing contraceptive products, services, and counseling to the employees of the charitable and educational agencies, while knowingly facilitating/initiating the process for the provision of

contraceptive services, products, and counseling through a third party. The Bishops, given their three sincerely-held religious beliefs, while wearing their "house-of-worship" hats, are not in any moral peril; yet, when they wear their "head-of-the-'good works'-agencies" hats, they must take affirmative actions which facilitate/initiate the provision of contraceptive products, services, and counseling in violation of their religious tenets.

Thus, the practical application of the two distinct regulations (one an "exemption" and one an "accommodation") allows the *same* members of the *same* religion to completely adhere to their religious beliefs at times (when the "exemption" applies), while other times, forces them to violate those beliefs (when the "accommodation" applies). Stated another way, even though Plaintiffs here share identical, religious beliefs, and even though they share the same persons as the religious heads of their organizations, the heads of Plaintiffs' service organizations may not fully exercise their right to those specific beliefs, when acting as the heads of the charitable and educational arms of the Church. The Court finds this enigmatic.

Furthermore, the Court is constrained to understand why religious employers such as Catholic Charities and Prince of Peace Center – which were borne from the same religious faith, and premised upon the same religious tenets and principles, and operate as extensions and embodiments of the Church, but are not subsidiaries of a parent corporation – would not be treated the same as the Church itself with respect to the free exercise of that religion. If the contraceptive mandate creates such a

substantial burden on the Dioceses' exercise of religion so as to require the religious employer "exemption," the contraceptive mandate obviously creates the same substantial burden on the nonprofit, religious affiliated/related organizations like Plaintiffs (*i.e.*, Catholic Charities, Prince of Peace Center, *et al.*), which implement the "good works" of the Dioceses.

The Court concludes that the religious employer "exemption" enables some religious employers to completely eliminate the provision of contraceptive products, services, and counseling through the Dioceses' health plans and third parties; while the religious employer "accommodation" requires other religious employers (often times the same member with the same sincerely-held beliefs) to take affirmative actions to facilitate/initiate the provision of contraceptive products, services, and counseling – albeit from a third-party.

The application of these two regulations – one an exemption and one an accommodation – has the effect of dividing the Catholic Church into two separate entities. Now, one regulation (the "exemption") applies to the worship arm of the Catholic Church and thus applies to all of those employees who work inside a church's walls. While the other regulation (the "accommodation") applies to the "good works" arms of the Catholic Church, and thus applies to those who stand on the church steps and pass out food and clothes to the needy. The Court concludes that by dividing the Catholic Church in such a manner with the enactment of these two regulations, the Government has created a

substantial burden on Plaintiffs' right to freely exercise their religious beliefs.

iv. Conclusion re: Substantial Burden

For the reasons set forth above, the Court concludes that the religious employer "accommodation" places a substantial burden on Plaintiffs' right to freely exercise their religion – specifically their right to *not* facilitate or initiate the provision of contraceptive products, services, or counseling. Thus, Plaintiffs have met their burden of proving that complying with the "accommodation" provision of the contraceptive mandate is a substantial burden on their free exercise of religion.

c. Compelling Governmental Interest under the RFRA

Given that the Court has concluded (for purposes of these Motions for Expedited Preliminary Injunction) that the "accommodation" places a substantial burden on Plaintiffs' free exercise of religion under the RFRA, the Court will now consider whether the RFRA's exception has been met. Accordingly, the Court must determine whether the contraceptive mandate, as applied to Plaintiffs via the "accommodation": (1) furthers a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C.A. § 2000bb-1.

As to the compelling interest test, the Court of Appeals in *Korte* stated:

> The compelling-interest test generally requires a "high degree of necessity." *Brown v. Entm't Merchs. Ass'n*, —— U.S. ——, ——, 131 S.Ct.

> 2729, 2741, 180 L.Ed.2d 708 (2011). The government must "identify an 'actual problem' in need of solving, and the curtailment of [the right] must be actually necessary to the solution." *Id.* at 2738 (citations omitted). In the free-exercise context, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Yoder*, 406 U.S. at 215. "[I]n this highly sensitive constitutional area, only the gravest abuses, endangering paramount interests, give occasion for permissible limitation " *Sherbert*, 374 U.S. at 406 (internal quotation marks and alteration omitted). The regulated conduct must "pose[ ] some substantial threat to public safety, peace[,] or order." *Id.* at 403. Finally, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (internal quotation marks omitted).

Korte, 2013 WL 5960692, *25.

The "compelling governmental interests" identified by the Government in this case are two-fold: (1) "the promotion of public health," and (2) "assuring that women have equal access to health care services." 13-cv-1459, Doc. No. 23, 20-21; 13-cv-303, Doc. No. 28, 20.

While the Court agrees that these two interests are certainly important governmental interests, the Court concludes that these two interests, as so

broadly stated,[21] are not "of the highest order" such that "those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Yoder*, 406 U.S. at 215.

In reaching this conclusion, the Court first notes that the existence of a religious employer "exemption" is an acknowledgment of the lack of a compelling

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[21] This Court further notes that, the Court of Appeals in *Korte* took great offense to the Government's identification of its two "compelling" interests stating:

> The government identifies two public interests — "public health" and "gender equality" — and argues that the contraception mandate furthers these interests by reducing unintended pregnancies, achieving greater parity in health-care costs, and promoting the autonomy of women both economically and in their reproductive capacities. This argument seriously misunderstands strict scrutiny. By stating the public interests so generally, the government guarantees that the mandate will flunk the test. Strict scrutiny requires a substantial congruity—a close "fit"—between the governmental interest and the means chosen to further that interest. Stating the governmental interests at such a high level of generality makes it impossible to show that the mandate is the least restrictive means of furthering them. There are many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty. Other Courts have deemed these to be too broad to be held to be compelling.

2013 WL 5960692 at *25.

See also Gonzales v. O Centro Espirita, 546 U.S. 418, 420 (2006) in which the Supreme Court of the United States held that Courts must look beyond "broadly formulated interests" justifying the application of Government mandates and scrutinize the asserted harm of granting specific exemptions to particular religious claimants. Invocation of general characteristics "cannot carry the day." *Id.*

governmental interest as to religious employers who hire employees for their "houses of worship." Simply put, as stated more fully above, the religious employers who qualify for the "exemption" do not have to directly provide, nor indirectly facilitate/initiate, the provision of any contraceptive products, services, and counseling. At a minimum, the existence of the "exemption" is an indication that the Government found its compelling interests to (1) promote public health, and (2) assure that women would have equal access to health care services, could not "overbalance the legitimate claims to the free exercise of religion" asserted by *some* religious employers – *i.e.*, the houses of worship. *Yoder*, 406 U.S. at 215; *see also Geneva College*, 2013 WL 3071481 at *10.

Thus, the Government's argument that its two stated compelling interests will not overbalance the exact same legitimate claims to the free exercise of religion (at times being raised by the same individuals – *i.e.*, Bishop Zubik in the Pittsburgh case 13-cv-1459) when asserted on behalf of a different religious affiliated/related employer fails. If the Court were to conclude that the Government's stated interests were sufficiently "compelling" to outweigh the legitimate claims raised by the nonprofit, religious affiliated/related Plaintiffs, the net effect (as noted above) would be to allow the Government to cleave the Catholic Church into two parts: worship, and service and "good works," thereby entangling the Government in deciding what comprises "religion." Accordingly, for purposes of reaching a decision on Plaintiffs' Motions for Expedited Preliminary Injunction, the Court refuses to conclude that the Government has compelling interests which

overbalance the legitimate claims to the free exercise of religion raised by the nonprofit, religious affiliated/related Plaintiffs.

The Court also notes that the "exemption" itself (which dictates that certain religious employers can legally decline to directly and indirectly facilitate the provision of contraceptive products, services, and counseling) was not predicated upon a "public health" basis to meet the two purported compelling interests. Instead, a religious employer's qualifications for the "exemption" is predicated upon the unrelated question of whether that religious employer files the IRS Form 990. 45 C.F.R. § 147.131(a) (August 1, 2013).

If there is no compelling governmental interest to apply the contraceptive mandate to the religious employers who operate the "houses of worship," then there can be no compelling governmental interest to apply (even in an indirect fashion) the contraceptive mandate to the religious employers of the nonprofit, religious affiliated/related entities, like Plaintiffs in these cases.

Despite the fact that the Government contends this analysis is "perverse" (*see* 13-cv-1459, Doc. No. 29, 24), the only argument it offers to support its position is that "[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers, including organizations eligible for the accommodation [*i.e.*, Plaintiffs in the instant cases], to employ people of the same faith who share the same objection, and who would therefore be less likely to use contraceptive services even if such services were covered under their plan." The Court

finds this statement speculative, and unsubstantiated by the record and, therefore, unpersuasive.

Next, the portions of the Administrative Record offered into evidence by the Government suggest that "women who receive their health coverage through employers *like plaintiffs* would face negative health and other outcomes " 77 Fed. Reg. at 8728; 78 Fed. Reg., at 39, 887 (emphasis added). Despite this assertion, the Government has failed to offer any testimony or other evidence during the Injunction Hearing to support the Government's claim that employees of these Plaintiffs have, in fact, suffered in the past, or will in the future, any "negative health or other outcomes," without the enforcement of the contraceptive mandate. In fact, the evidence was to the contrary.

Finally, as stated above, whether intended or not, the application of two distinct regulations (one providing a complete "exemption," the other merely providing an "accommodation") to religious employers who hold the same basic religious tenets unnecessarily – and in direct contravention to the RFRA and the Free Exercise Clause of the First Amendment – entangles the Government into determining what constitutes "religion." By having these two, separate regulations "on the books," the Government has essentially detached worship and faith from "good works" and has determined that a religious employer's complete freedom to exercise religion ends at the church doors. Once outside the church doors, that employer's religious beliefs must take a back seat to the stated compelling governmental interests. The Government thus seeks

to restrict the Right to the Free Exercise of Religion set forth in the First Amendment to a Right of Worship only.

For all of the reasons set forth above, the Court concludes that the Government has failed, factually and legally, to establish that its two stated governmental interests are "of the highest order" such that "those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Yoder*, 406 U.S. at 215.

d. Least Restrictive Means under the RFRA

Given that Plaintiffs have met their burden of showing that the "accommodation" creates a substantial burden on their free exercise of religion, and given that the Government has failed to meet its burden of proving that it had a compelling interest to apply the contraceptive mandate, via the "accommodation," to Plaintiffs, the Court need not consider whether the "accommodation" was the least restrictive means of meeting the stated compelling interests. Nevertheless, the Court also concludes that the Government failed to adduce evidence that definitively establishes that it used the least restrictive means to meet the stated compelling government interests.

First, the Government proffers that the "accommodation" was not only the "least restrictive means," but the "only possible means" of furthering the two compelling governmental interests to: (1) promote public health, and (2) assure that women would have equal access to health services. The Government's position is simply that this "accommodation" (*i.e.*, the acts of signing a self-

certification form and gathering/delivering employee list(s) to their health insurer or TPA) was the "least" and the "only possible means," of furthering the two stated compelling governmental interests.

If the Government is correct that the entire fundamental statutory scheme set forth in the ACA will fail, without the participation in the contraceptive mandate by nonprofit, religious affiliated/related Plaintiffs and others like them (*i.e.*, food pantries, homeless shelters, etc.), which operate under the authority of an already exempt religious body (*i.e.*, Plaintiff Erie Diocese), then the foundation of the "statutory scheme" is certainly troubled.

Under the RFRA, the "accommodation" must be the "least restrictive means" to further the two stated compelling governmental interests. The Government neither at the Injunction Hearing, nor in the Administrative Record, offered any evidence concerning: (1) the identity of all other possible "least restrictive means" considered by the Government; (2) the analysis of each of the "means" to determine which was the "least" restrictive; (3) the identity of the person(s) involved in the identification and evaluation of the alternative "means"; or (4) "evidence-based" analysis as to why the Government believes that the "accommodation" is the "least restrictive means."

Instead, the Government argues that all the "accommodation" requires is a signature on a piece of paper. Once the signed document is received by the insurer or TPA, the contraceptive products, services, and counseling will then be made part of the nonprofit, religious affiliated/related Plaintiffs' health care plan at no cost to the Plaintiffs – except, of

course, for the incalculable cost of the loss of their rights to freely exercise their religion.

As noted throughout this Opinion, this Court has found that the Government conceded that Plaintiffs' beliefs are sincerely-held. Despite these concessions, the Government trivializes these sincerely-held beliefs of Plaintiffs throughout its Brief in Opposition, to wit, the "accommodation": (1) "requires virtually nothing of Plaintiffs" (13-cv-1459, Doc. No. 23, 9-10; 13-cv-303, Doc. No. 28, 9-10, 20); (2) "certainly does not require Plaintiffs to modify their behavior in any meaningful way" (*id.*); (3) is "no more than a *de minimis* burden" (*id.*); (4) requires Plaintiffs to "do next to nothing" (*id.*); and (5) Plaintiffs "need only fulfill the self-certification requirement and provide the completed self-certification to their issuers and TPAs" (13-cv-1459, Doc. No. 23, 21). Further, there is nothing in the record to establish, or even hint, that a broader "religious employer" exemption, to include Plaintiffs (*i.e.*, Catholic Charities, Prince of Peace Center, *et al.*), would have any impact at all on "the entire statutory scheme."

During the Injunction Hearing, the Court specifically asked the Government about its stated compelling interests and the means it took to advance them. The Government directed the Court's attention to a precise section of the Administrative Record which reads, in pertinent part:

> Fifth, some commentators asserted that the contraceptive coverage requirement [the contraceptive mandate] is not the least restrictive means of advancing those compelling interests, and proposed various alternatives to

> these regulations. All of these proposals were considered, and it was determined that they were not feasible and/or would not advance the government's compelling interests as effectively as the mechanisms established in these final regulations and the preventative services coverage more generally.

78 Fed. Reg. 39888 (July 2, 2013).

As to this "argument," the Court first notes that it is not the commentators' responsibility to draft the regulations employing the least restrictive means – that obligation rests with the Government. Second, the regulation itself clearly announces that the alternatives to the current regulations – including the contraceptive mandate – would not advance the Government's interests "as *effectively* as" the contraceptive mandate and the "accommodation." Greater efficacy does not equate to the least restrictive means.

Thus, the Court concludes that the Government failed to present any credible evidence tending to prove that it utilized the least restrictive means of advancing those interests.

e. Conclusion – Likelihood of Success

After hearing the testimony of Cardinal Dolan, Bishop Zubik, Bishop Persico, and all of the other witnesses for Plaintiffs, the Court made the factual determination that Plaintiffs possess a sincerely-held belief that the burden imposed by the execution of the self-certification form is not *de minimis*. Plaintiffs sincerely believe that by signing the self-certification form, required by the "accommodation," they will facilitate/initiate the provision of

contraceptive products, services, and counseling. Plaintiffs also sincerely believe that this facilitation/initiation is no different than if Plaintiffs directly provided those same products, services, and counseling. The Court concludes that the "accommodation," in effect, causes these Plaintiffs to comply with the contraceptive mandate which violates their sincerely-held religious beliefs – that "the sanctity of human life which begins at conception," and "facilitation of evil is the same as proliferation of evil" – and thus, places a substantial burden on Plaintiffs' ability to exercise their religion. The Court also concludes that the Government has, thus far, in this litigation, failed to show these regulations meet a compelling governmental interest and are sufficiently narrowly-tailored to meet those interests, and/or to demonstrate that the "accommodation" is the least restrictive means to meet those stated interests.

Based on the foregoing analysis, the Court finds that Plaintiffs are likely to succeed on the merits, and thus, they have met the first element of the preliminary injunction test.

2. Irreparable Harm to Plaintiffs

In the context of a preliminary injunction, irreparable harm is harm that cannot be adequately compensated at a later date in the ordinary course of litigation. *Acierno v. New Castle Cnty.* 40 F.3d 645, 653 (3d Cir. 1994) (In general, to show irreparable harm a plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial.) The Supreme Court of the United States has held "[t]he loss of First Amendment freedoms," which implicates the Free

Exercise Clause as protected by the RFRA, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Recently, in a First Amendment-free speech case, the United States Court of Appeals for the Third Circuit held that a ban preventing students in a school from exercising their right to free speech, "unquestionably constitute[d] irreparable injury," where "[a]n after-the-fact money judgment would hardly make up for their lost opportunity" to exercise their right to free speech. *B.H. ex rel. Hawk v. Easton Area School Dist.*, 725 F.3d 293, 323 (3d Cir. 2013).

Turning to the instant matter, Plaintiffs need to decide by December 31, 2013, whether or not to sign the self-certification form thereby by violating their sincerely-held religious beliefs. Plaintiffs will not drop health coverage as of January 1, 2014, for their employees – because they believe that health care is a basic human right. *See* Cardinal Dolan Deposition (13-cv-303, Doc. No. 52; 13-cv-1459, Doc. No. 53), pg. 28, lines 19-23; Hearing Testimony, Bishop Zubik, pg. 38, lines 23-24; Hearing Testimony, Bishop Persico, pg. 73, lines 23-25; Declaration of Father Scott Detisch, Ph.D. (P-92), ¶ 25; Declaration of Father Ronald P. Lengwin (P-88), ¶ 34. Plaintiffs cannot sign the self-certification form knowing that their signatures will facilitate/initiate the provision of the contraceptive products, services, and counseling which violate their sincerely-held beliefs.

Plaintiffs also have provided credible testimony and evidence which support their contentions that they will provide health coverage, but will

conscientiously object to the contraceptive mandate and the "accommodation" by refusing to sign the self-certification form, thereby potentially suffering financial penalties which would negatively impact those entities that provide services to individuals who depend upon Plaintiffs for food, shelter, educational, and other basic services. Hearing Testimony, Susan Rauscher, pg. 61, lines 17-18, pg. 62, lines 21-25; Hearing Testimony Father Jabo, pg. 99, lines 8-10; Hearing Testimony of Mary Maxwell, pg. 115, lines 23-25; Declaration of Mary Maxwell (P-90), ¶ 20; Declaration of Father Scott Detisch, Ph.D. (P-92), ¶ 32. In addition, Plaintiffs' failure to sign the self-certification form by December 31, 2013, places them in a situation where they may be faced with enforcement proceedings such as liens on their property, and possible execution on those liens.

Given the evidence presented by Plaintiffs, the Court concludes that the harm to Plaintiffs, and the ripple effect of that harm impacting members of the public who depend upon Plaintiffs for food, shelter, educational, and other basic services, is such that Plaintiffs could never be adequately compensated at a later date in the ordinary course of this litigation. Accordingly, the Court concludes Plaintiffs stand to suffer irreparable harm if the injunction were not granted.

3. Greater Harm to the Government

Conversely, the Court concludes that there will be no irreparable harm to the Government if the preliminary injunction is granted.[22] In reaching this

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[22] Plaintiffs seek narrowly-tailored injunctive relief – only as to one of the eight categories of preventive services for women

conclusion, the Court notes that despite the Government's two stated interests: (1) "the promotion of public health," and (2) "assuring that women have equal access to health care services"), *any* employers with fifty (50) or less employees do not have to provide their employees with *any health care coverage at all.* 26 U.S.C. § 4980H(c)(2)(A). In addition, religious employers who can meet the criteria for an "exemption" have to provide health coverage to their employees, but do not have to offer contraceptive products, services, and counseling. They do not have to "sign a form" thereby facilitating/initiating the provision of contraceptive products, services, and counseling through a third party. Finally, there are "innumerable" employers who have "grandfathered" health coverage plans which may or may not provide for all of the components required under the ACA, including the contraceptive products, services, and counseling required by the contraceptive mandate.

The Court concludes that the combined nationwide total of all of those employers who fall within an exclusion, an exemption, or whose plans are "grandfathered" (approximately 100 million individuals are on "grandfathered" health plans) creates such an "underinclusiveness" which demonstrates that the Government will not be harmed in any significant way by the exclusion of these few Plaintiffs. *Gilardi*, 2013 WL 5854246, at *13; Geneva College, 2013 WL 3071481, at * 10; Additional Stipulated Facts, ¶¶ 4, 6. This conclusion again weighs in favor of the Court granting a

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required by the ACA and its implementing regulations. Additional Stipulations of Fact, ¶¶ 15-17.

preliminary injunction, keeping the parties at *status quo* while the significant issues involved in these cases are resolved in a thoughtful and orderly manner.

4. Public Interest

Lastly, granting the preliminary injunction furthers the public interest. As noted above, the Court concludes that it is in the public interest to have the issues presented herein, considered in a thoughtful and orderly manner. These issues include whether the Government will be permitted to sever the Catholic Church into two parts (*i.e.*, worship and faith, and "good works") – in other words, whether the Government will be successful in restricting the Right to the Free Exercise of Religion as set forth in the First Amendment to a Right to Worship only. This reflective consideration as to nonprofit, religious affiliated/related entities, including Plaintiffs, is all the more in the public interest, because the Free Exercise of Religion is a fundamental right.

The public interest also is best served if Plaintiffs (non-profit, affiliated/related organizations) can continue to provide needed educational and social services, without the threat of substantial fines for non-compliance with the contraceptive mandate as imposed upon them via the "accommodation." As previously noted, such fines would impede the provision of those services to thousands of individuals who have no other means of obtaining necessary food, shelter, and other basic assistance. Hearing Testimony of Mary Maxwell (re: St. Martin Center and Prince of Peace Center), pg. 115, lines 23-25 (fines "would be devastating for all of our clients, the poor - - these are single women, children.")

> [I]t would be drastic if-if these fines had to be dealt with. [P]eople would lose jobs. Our community in Erie counts on the St. Martin Center. It – it would be devastating for all concerned, for our church. It just – it – it isn't something that we could cope with.

Id. at pg. 116, lines 5-10. A preliminary injunction, preserving the *status quo*, prevents any reduction in those services and thus is in the best interests of the public.

VI. Conclusion

Based upon the foregoing Findings of Fact, Conclusions of Law, and cited legal authority, the Court concludes that Plaintiffs have met their burden of proving all four criteria of the preliminary injunction test, and thus, for the reasons set forth herein, Plaintiffs' Motions for Expedited Preliminary Injunction will be GRANTED.

s/ Arthur J. Schwab
Arthur J. Schwab
United States District Court
Judge

cc: All Registered ECF Counsel and Parties

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MOST REVEREND LAWRENCE T. PERSICO, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF ERIE, et al., PLAINTIFFS v. KATHLEEN SEBELIUS, et al., DEFENDANTS.	CIVIL ACTION NO. 1:13-00303 JUDGE ARTHUR J. SCHWAB
MOST REVEREND DAVID A. ZUBIK, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF PITTSBURGH, et al., PLAINTIFFS, v. KATHLEEN SEBELIUS, et al., DEFENDANTS.	CIVIL ACTION NO. 2:13-cv-001459 JUDGE ARTHUR J. SCHWAB

FINAL JUDGMENT AND ORDER

Upon consideration of the Unopposed Motion to Convert Preliminary Injunction Into Permanent Injunction, Plaintiffs' Memorandum in support, and the Government's Notice of Non-Opposition, as well

as the Memorandum and declarations in support and in opposition to Plaintiffs' Motions for Expedited Preliminary Injunction (13-cv-1459: Doc. No. 4; 13-cv-0303: Doc. No. 6), the testimony and evidence received at the November 12 and 13, 2013 Preliminary Injunction Hearing, the Parties' oral argument during the Preliminary Injunction Hearing and for the reasons set forth in the Court's November 21, 2013 Memorandum Opinion which includes the Court's Findings of Fact and Conclusions of Law (Doc. No. 75),

THE COURT hereby expressly incorporates, adopts, re-affirms, and follows its November 21, 2013 Memorandum Opinion (Doc. No. 75).

THE COURT hereby finds:

- Defendants have conceded that they would not present any additional evidence if the Court ordered briefing and a hearing before granting a permanent injunction;
- The Court's November 21, 2013 Memorandum Opinion is a sufficient basis to grant a permanent injunction;

THE COURT further hereby finds, based on the Government's concession that it would not present additional evidence and for the reasons stated in the Court's November 21, 2013 Memorandum Opinion:

- Plaintiffs have met their burden of demonstrating a substantial burden on their religious exercise;
- The Government has not met its burden of demonstrating that it used the least restrictive means of achieving any compelling governmental interest; and

- Therefore, Plaintiffs have established actual success on their claim that the requirements imposed upon the Plaintiffs in 42 U.S.C. § 300gg-13(a)(4), and as further regulated by 45 C.F.R. § 1 47.130(a)(1)(iv), violate the Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb-1;

THE COURT hereby finds that Plaintiffs have satisfied all four elements of the permanent injunction standard as articulated in *Shields v. Zuccarini*, 254 F.3d 476, 482 (3d Cir. 2001), based on the foregoing Findings, based on the Government's concession that it would not present additional evidence, and for the reasons stated in the Court's November 21, 2013 Memorandum Opinion.

IT IS HEREBY ORDERED that Plaintiffs' Unopposed Motion to Convert Preliminary Injunction Into Permanent Injunction is hereby GRANTED;

IT IS FURTHER ORDERED that Defendants, their agents, officers, and employees are hereby ENJOINED from applying or enforcing the requirements imposed in 42 U.S.C. § 300gg13(a)(4) and as further regulated by 45 C.F.R. § 147.130(a)(l)(iv) upon the Plaintiffs, including:

(a) Plaintiffs Most Reverend David A. Zubik and Most Reverend Lawrence T. Persico shall not have to sign or authorize any entity under their control to sign the self-certification form;

(b) Plaintiffs The Roman Catholic Diocese of Pittsburgh and The Roman Catholic Diocese of Erie shall be allowed to continue sponsoring their health plans, including through the Pittsburgh Series of the Catholic Employers Benefits Trust, without having to

comply with the Mandate, including the accommodation;

(c) Plaintiffs Catholic Charities of the Diocese of Pittsburgh, Inc.; St. Martin Center, Inc.; Prince of Peace Center, Inc.; and Erie Catholic Preparatory School shall not have to comply with the Mandate, including the accommodation;

IT IS FURTHER ORDERED that Defendants shall send Notice of this permanent injunction to Plaintiffs' Third Party Administrators, Highmark, Inc. and UPMC, on or before December 30, 2013, with a copy to Plaintiffs' counsel and to the Court; and

IT IS FURTHER ORDERED that a bond in the amount of zero (0) dollars is appropriate.

THIS COURT shall retain jurisdiction to enforce this Final Judgment and Order.

SO ORDERED, this 29th day of December, 2013.

/s/ Arthur J. Schwab
Hon. Arthur J. Schwab
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 14-1376 and 14-1377

MOST REVEREND LAWRENCE T. PERSICO, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF ERIE, AS TRUSTEE OF THE ROMAN CATHOLIC DIOCESE OF ERIE, A CHARITABLE TRUST; THE ROMAN CATHOLIC DIOCESE OF ERIE; ST. MARTIN CENTER, INC., AN AFFILIATE NONPROFIT CORPORATION OF CATHOLIC CHARITIES OF THE DIOCESE OF ERIE; PRINCE OF PEACE CENTER, INC., AN AFFILIATE NONPROFIT CORPORATION OF CATHOLIC CHARITIES OF THE DIOCESE OF ERIE; ERIE CATHOLIC PREPARATORY SCHOOL, AN AFFILIATE NONPROFIT CORPORATION OF THE ROMAN CATHOLIC DIOCESE OF ERIE

v.

SECRETARY OF UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY OF UNITED STATES DEPARTMENT OF LABOR; SECRETARY OF UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF

HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY,

Appellants in Case No.: 14-1376

MOST REVEREND DAVID A. ZUBIK, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF PITTSBURGH, as Trustee of the Roman Catholic Diocese of Pittsburgh, a Charitable Trust;
THE ROMAN CATHOLIC DIOCESE OF PITTSBURGH,
as the Beneficial Owner of the Pittsburgh series of the Catholic Benefits Trust;
CATHOLIC CHARITIES OF THE DIOCESE OF PITTSBURGH, INC.,
an affiliate nonprofit corporation of the Roman Catholic Diocese of Pittsburgh

v.

SECRETARY OF UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY OF UNITED STATES DEPARTMENT OF LABOR; SECRETARY OF UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY,

Appellants in Case No.: 14-1377

(District Court Nos.: 1-13-cv-00303 and 2-13-cv-01459)

SUR PETITION FOR REHEARING

Present: McKEE, *Chief Judge*, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, and SLOVITER*
Circuit Judges

The petition for rehearing filed by **appellees** in the above-entitled cases having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petitions for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/MAJORIE O. RENDELL
Circuit Judge

Dated: April 6, 2015
CJG/cc: All Counsel of Record

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* The vote of Judge Dolores K. Sloviter, is limited to Panel Rehearing only.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

April 9, 2015

Nos. 14-1376 and 14-1377

MOST REVEREND LAWRENCE T. PERSICO, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF ERIE, AS TRUSTEE OF THE ROMAN CATHOLIC DIOCESE OF ERIE, A CHARITABLE TRUST; THE ROMAN CATHOLIC DIOCESE OF ERIE; ST. MARTIN CENTER, INC., AN AFFILIATE NONPROFIT CORPORATION OF CATHOLIC CHARITIES OF THE DIOCESE OF ERIE; PRINCE OF PEACE CENTER, INC., AN AFFILIATE NONPROFIT CORPORATION OF CATHOLIC CHARITIES OF THE DIOCESE OF ERIE; ERIE CATHOLIC PREPARATORY SCHOOL, AN AFFILIATE NONPROFIT CORPORATION OF THE ROMAN CATHOLIC DIOCESE OF ERIE

v.

SECRETARY OF UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY OF UNITED STATES DEPARTMENT OF LABOR; SECRETARY OF UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES

DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY,

Appellants

(W.D. Pa. Nos. 1-13-cv-00303, 2-13-cv-01459)

Present: MCKEE, Chief Judge, RENDELL and SLOVITER, *Circuit Judges*

1. Appellees' Motion for Stay of Mandate Pending Petition for Writ of Certiorari.

Respectfully,
Clerk/tmm

ORDER

The foregoing Appellees' Motion for Stay of Mandate Pending Petition for Writ of Certiorari is hereby denied.

By the Court,

s/ Theodore A. McKee
Circuit Judge

Dated: April 15, 2015
tmm/cc: all counsel of record

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 13-3536, 14-1374, 14-1376, 14-1377

GENEVA COLLEGE; WAYNE HEPLER; THE SENECA HARDWOOD LUMBER COMPANY, INC., a Pennsylvania Corporation; WLH ENTERPRISES, a Pennsylvania Sole Proprietorship of Wayne L. Hepler; CARRIE E. KOLESAR

v.

SECRETARY UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY UNITED STATES DEPARTMENT OF LABOR; SECRETARY UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY,

Appellants in case no. 13-3536

GENEVA COLLEGE; WAYNE L. HEPLER, in his personal capacity and as owner and operator of the sole proprietorship WLH Enterprises; THE SENECA HARDWOOD LUMBER COMPANY, INC., a Pennsylvania Corporation; CARRIE E. KOLESAR

v.

SECRETARY UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY UNITED STATES DEPARTMENT OF LABOR; SECRETARY UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY,

Appellants in case no. 14-1374

MOST REVEREND LAWRENCE T. PERSICO, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF ERIE, AS TRUSTEE OF THE ROMAN CATHOLIC DIOCESE OF ERIE, A CHARITABLE TRUST; THE ROMAN CATHOLIC DIOCESE OF ERIE; ST. MARTIN CENTER, INC., AN AFFILIATE NONPROFIT CORPORATION OF CATHOLIC CHARITIES OF THE DIOCESE OF ERIE; PRINCE OF PEACE CENTER, INC., AN AFFILIATE NONPROFIT CORPORATION OF CATHOLIC CHARITIES OF THE DIOCESE OF ERIE; ERIE CATHOLIC PREPARATORY SCHOOL, AN AFFILIATE NONPROFIT CORPORATION OF THE ROMAN CATHOLIC DIOCESE OF ERIE

v.

SECRETARY OF UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY OF UNITED STATES DEPARTMENT OF LABOR; SECRETARY OF UNITED STATES DEPARTMENT OF THE TREASURY; UNITED

STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY,

Appellants in case no. 14-1376

MOST REVEREND DAVID A. ZUBIK, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF PITTSBURGH, as Trustee of the Roman Catholic Diocese of Pittsburgh, a Charitable Trust; THE ROMAN CATHOLIC DIOCESE OF PITTSBURGH, as the Beneficial Owner of the Pittsburgh series of The Catholic Benefits Trust; CATHOLIC CHARITIES OF THE DIOCESE OF PITTSBURGH, INC., an affiliate nonprofit corporation of The Roman Catholic Diocese of Pittsburgh

v.

SECRETARY OF UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY OF UNITED STATES DEPARTMENT OF LABOR; SECRETARY OF UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY,

Appellants in case no. 14-1377

On Appeal from the United States District Court for the Western District of Pennsylvania

(District Court Nos.: 1-13-cv-00303; 2-12-cv-00207 and 2-13-cv-01459)

District Judges: Honorable Joy Flowers Conti; Honorable Arthur J. Schwab

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Argued on November 19, 2014

Before: McKEE, *Chief Judge*, RENDELL, SLOVITER, *Circuit Judges*

JUDGMENT

These cases came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued on November 19, 2014.

On consideration whereof,

IT IS ORDERED and ADJUDGED by this Court that the Judgments of the District Court entered June 18, 2013, December 20, 2013, and December 23, 2013, be and the same, are hereby **reversed**.

Costs taxed against the appellees.

All of the above in accordance with the Opinion of this Court.

ATTEST:

s/Marcia M. Waldron

Clerk of the Court

Dated: February 11, 2015

* * *

OFFICE OF THE CLERK
MARCIA M. WALDRON CLERK
UNITED STATES COURT OF APPEALS
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
Website: www.ca3.uscourts.gov
TELEPHONE
215-597-2995
April 15, 2015

Mr. Robert V Barth Jr.
United States District Court for the Western District of Pennsylvania
P.O. Box 1820
Erie, PA 16501

RE: Lawrence Persico, et al v. Secretary United States Depart, et al
Case Numbers: 14-1376, 13-3536, 14-1374, 14-1377
District Case Numbers: 1-13-cv-00303, 2-12-cv-00207, 2-13-cv-01459

Dear District Court Clerk,

Enclosed herewith is the certified judgment together with copy of the opinion in the above- captioned case(s). The certified judgment is issued in lieu of a formal mandate and is to be treated in all respects as a mandate.

Kindly acknowledge receipt for same on the enclosed copy of this letter.

Counsel are advised of the issuance of the mandate by copy of this letter. The certified judgment is also enclosed showing costs taxed, if any.

Very truly yours,

/s/ Maria M. Waldron
Marcia M. Waldron, Clerk

By: /s/ Timothy McIntyre
Timothy McIntyre, Case Manager
267-299-4953

cc: Gregory S. Baylor

Matthew S. Bowman
Kimberlee W. Colby
Charles E. Davidow
Leon F. DeJulius Jr.
Deborah J. Dewart
John D. Goetz
Adam C. Jed
Ira M. Karoll
Ayesha N. Khan
Alison M. Kilmartin
Alisa B. Klein
Patrick Nemeroff
Paul M. Pohl
Sara J. Rose
Sarah Somers
Mary Pat Stahler
Mark B. Stern

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 14-1376

MOST REVEREND LAWRENCE T. PERSICO, ET AL.

V

SECRETARY OF UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., APPELLANTS

(W.D. PA. 1-13-CV-00303)

NO. 14-1377

MOST REVEREND DAVID A. ZUBIK, ET AL.

V.

SECRETARY OF UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; ET AL., APPELLANTS

(W.D. PA. NO. 2-13-CV-01459)

ORDER

By order entered April 15, 2015, the Supreme Court of the United States order that the mandate issued by the Third Circuit Court of Appeals be recalled and stayed pending receipt of a response and further order of the Supreme Court.

In accordance with this directive, it is hereby O R D E R E D that the mandate in this matter is hereby recalled.

For the Court,

/s/ Marcia M. Waldron

Marcia M. Waldron, Clerk
Date: April 16, 2015
tmm/cc: all counsel of record

Supreme Court of the United States

NO. 14A1065

MOST REVEREND DAVID A. ZUBIK, ET AL.,
APPLICANTS

V.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

O R D E R

UPON CONSIDERATION of the application of counsel for the applicants.

IT IS ORDERED that the mandate of the United States Court of Appeals for the Third Circuit, case Nos. 14-1376 & 14-1377, issued April 15, 2015, is hereby recalled and stayed pending receipt of a response, due on or before April 20, 2015, and further order of the undersigned or of the Court.

/s/ Samuel A. Alito, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 15th day of April, 2015.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

MOST REVEREND LAWRENCE T. PERSICO, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF ERIE, et al.,	)	CIVIL ACTION NO. 1:13-00303
PLAINTIFFS,	)	JUDGE ARTHUR J. SCHWAB
v.	)	
KATHLEEN SEBELIUS, et al.,	)	
DEFENDANTS.	)	
MOST REVEREND DAVID A. ZUBIK, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF PITTSBURGH, et al.,	)	CIVIL ACTION NO. 2:13-cv-01459
PLAINTIFFS,	)	JUDGE ARTHUR J. SCHWAB
v.	)	
KATHLEEN SEBELIUS, et al.,	)	

DEFENDANTS.)
)

STIPULATION TO UNDISPUTED FACTS

The following facts are undisputed for the Court's consideration of Plaintiffs' pending Motions for Preliminary Injunctions:

I. STATUTORY AND REGULATORY HISTORY

A. Statutory Background

1. In March 2010, Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), and the Health Care and Education

* * *

II. PLAINTIFF-SPECIFIC FACTS

A. *Persico* Plaintiffs

52. For purposes of ruling on Plaintiffs' motion for preliminary injunction, the Government does not contest the declarations of the following individuals:

53. Declaration of Fr. Scott W. Jabo for Erie Catholic Preparatory School. (Ex. 1.)

54. Declaration of Mary Maxwell for St. Martin Center, Inc. and Prince of Peace Center, Inc. (Ex. 2.)

55. Declaration of David J. Murphy for the Roman Catholic Diocese of Erie, St. Martin Center, Inc., Price of Peace Center, Inc., and Erie Catholic Preparatory School. (Ex. 3.)

56. Declaration of Fr. Scott Detisch for the Roman Catholic Diocese of Erie, St. Martin Center, Inc., Price of Peace Center, Inc., and Erie Catholic Preparatory School (Ex. 4.)

(1) Diocese of Erie

57. The Diocese encompasses thirteen counties in Northwestern Pennsylvania.

58. The Diocese carries out its Christ-centered mission in three main ways:

59. by educating children within the Diocese;

60. by promoting spiritual growth, including conducting religious services, operating seminaries and hosting religious orders.

61. through community service.

62. The Diocese operates thirty elementary schools, three middle schools, and six secondary schools, which educate over 6,400 students.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MOST REVEREND LAWRENCE T. PERSICO, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF ERIE, et al.,	)	CIVIL ACTION NO. _____
PLAINTIFFS,	)	ELECTRONICALLY FILED
v.	)	
KATHLEEN SEBELIUS, et al.,	)	
DEFENDANTS.	)	

DECLARATION OF FATHER SCOTT DETISCH, PH.D.

I, Father Scott Detisch, Ph.D., pursuant to 28 U.S.C. § 1746, depose and state as follows:

1. I am over the age of 18 and competent to make this declaration in support of Plaintiffs' Motion for Preliminary Injunction in the above-captioned matter. 1 am familiar with and have personal knowledge of the facts set forth in this declaration. If called to testify, I would testify in a manner consistent with the statements set forth below.

2. I have a doctorate degree in Systematic Theology. I am serving as a theological advisor to Most Reverend Lawrence T. Persico, Bishop of the Roman Catholic Diocese of Erie on matters of Catholic doctrine, including moral theology. I am advising the Bishop on ecclesiastic and theological

matters affecting the Diocese and entities and individuals within the Diocese.

3. I currently serve as an Adjunct Faculty Member at Saint Mary Seminary & Graduate School of Theology, where I teach Systematic Theology, I have served as the Director of the Center for Pastoral Studies at Gannon University in Erie. Pennsylvania.

* * *

22. The self-certification form also designates the TPA as Plaintiffs' plan administrator for the provision of the objectionable services. Without the self-certification form, the TPA is prohibited from providing coverage for the objectionable services to Plaintiffs' employees.

23. A religious organization's self-certification, therefore, is a trigger and but-for cause of the objectionable coverage. In other words, under the final version of the Mandate, St. Martin Center's, Prince of Peace Center's, and Erie Catholic's decision to participate in the Diocesan health plan triggers the provision of contraceptive benefits to their employees in a manner contrary to their beliefs. This direct causal connection to immoral activity is material cooperation in contravention of Plaintiffs' religious beliefs. Therefore, it is morally improper for St. Martin Center, Prince of Peace Center, and Erie Catholic to execute the self-certification, which will result in facilitating the provision of the objectionable services to their employees.

24. The Diocese is forced to further facilitate evil by providing Plaintiffs' TPA with the names of individuals insured through the Diocesan health plan, who are employees or dependents of employees of nonexempt entities, such as Plaintiffs St. Martin

Center, Prince of Peace Center, and Erie Catholic. By providing these names, the Diocese enables, and indeed triggers, the TPA reaching out to these individuals to notify them that the TPA will arrange for coverage and provision of the objectionable services. This is material cooperation in violation of Catholic beliefs.

25. The Diocese's provision of health benefits to its employees and to the employees of affiliated entities, such as Plaintiffs St. Martin Center, Prince of Peace Center, and Erie Catholic, reflects the Catholic social teaching that healthcare is among those basic

APPENDIX I

42 U.S.C. § 2000bb-1 provides:

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C.A. § 2000bb-2 provides:

§ 2000bb-2. Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

42 U.S.C. § 2000cc-5 provides:

§ 2000cc-5 Definitions

In this chapter:

(1) Claimant

The term "claimant" means a person raising a claim or defense under this chapter.

(2) Demonstrates

The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) Free Exercise Clause

The term "Free Exercise Clause " means that portion of the First Amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) Government

The term "government"—

(A) means—

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 2000cc-2(b) and 2000cc-3 of this title, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) Land use regulation

The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) Program or activity

The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 2000d-4a of this title.

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule

The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

42 U.S.C. § 300gg-13(a)(4) provides:

§ 300gg-13. Coverage of preventive health services

(a) In general

A group health plan and a health insurances issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—

* * *

(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

26 U.S.C. § 4980D provides:

§ 4980D. Failure to meet certain group health plan requirements

(a) General rule.—There is hereby imposed a tax on any failure of a group health plan to meet the requirements of chapter 100 (relating to group health plan requirements).

(b) Amount of tax.—

(1) In general.—The amount of the tax imposed by subsection (a) on any failure shall be $100 for each day in the noncompliance period with respect to each individual to whom such failure relates.

(2) Noncompliance period.—For purposes of this section, the term "noncompliance period" means, with respect to any failure, the period—

(A) beginning on the date such failure first occurs, and

(B) ending on the date such failure is corrected.

(3) Minimum tax for noncompliance period where failure discovered after notice of examination.—Notwithstanding paragraphs (1) and (2) of subsection (c)—

(A) In general.—In the case of 1 or more failures with respect to an individual—

(i) which are not corrected before the date a notice of examination of income tax liability is sent to the employer, and

(ii) which occurred or continued during the period under examination,

the amount of tax imposed by subsection (a) by reason of such failures with respect to such individual shall not be less than the lesser of $2,500 or the amount of tax which would be imposed by subsection (a) without regard to such paragraphs.

(B) Higher minimum tax where violations are more than de minimis.—To the extent violations for which any person is liable under subsection (e) for any year are more than de minimis, subparagraph (A) shall be applied by substituting "$15,000" for "$2,500" with respect to such person.

(C) Exception for church plans.—This paragraph shall not apply to any failure under a church plan (as defined in section 414(e)).

(c) Limitations on amount of tax.—

(1) Tax not to apply where failure not discovered exercising reasonable diligence.—No tax shall be imposed by subsection (a) on any failure during any period for which it is established to the satisfaction of the Secretary that the person otherwise liable for such tax did not know, and exercising reasonable diligence would not have known, that such failure existed.

(2) Tax not to apply to failures corrected within certain periods.—No tax shall be imposed by subsection (a) on any failure if—

(A) such failure was due to reasonable cause and not to willful neglect, and

(B)(i) in the case of a plan other than a church plan (as defined in section 414(e)), such failure is corrected during the 30-day period beginning on the first date the person otherwise liable for such tax knew, or exercising reasonable diligence would have known, that such failure existed, and

(ii) in the case of a church plan (as so defined), such failure is corrected before the close of the correction period (determined under the rules of section 414(e)(4)(C)).

(3) Overall limitation for unintentional failures.—In the case of failures which are due to reasonable cause and not to willful neglect—

(A) Single employer plans.—

(i) In general.—In the case of failures with respect to plans other than specified multiple employer health plans, the tax imposed by subsection (a) for failures during the taxable year of the employer shall not exceed the amount equal to the lesser of—

(I) 10 percent of the aggregate amount paid or incurred by the employer (or predecessor employer) during the preceding taxable year for group health plans, or

(II) $500,000.

(ii) Taxable years in the case of certain controlled groups.—For purposes of this subparagraph, if not all persons who are treated as a single employer for purposes of this section have the same taxable year, the taxable years taken into account shall be determined under principles similar to the principles of section 1561.

(B) Specified multiple employer health plans.—

(i) In general.—In the case of failures with respect to a specified multiple employer health plan, the tax imposed by subsection (a) for failures during the taxable year of the trust forming part of such plan shall not exceed the amount equal to the lesser of—

(I) 10 percent of the amount paid or incurred by such trust during such taxable year to provide medical care (as defined in section 9832(d)(3)) directly or through insurance, reimbursement, or otherwise, or

(II) $500,000.

For purposes of the preceding sentence, all plans of which the same trust forms a part shall be treated as one plan.

(ii) Special rule for employers required to pay tax.—If an employer is assessed a tax imposed by subsection (a) by reason of a failure with respect to a specified multiple employer health plan, the limit shall be determined under subparagraph (A) (and not

under this subparagraph) and as if such plan were not a specified multiple employer health plan.

(4) Waiver by Secretary.—In the case of a failure which is due to reasonable cause and not to willful neglect, the Secretary may waive part or all of the tax imposed by subsection (a) to the extent that the payment of such tax would be excessive relative to the failure involved.

(d) Tax not to apply to certain insured small employer plans.—

(1) In general.— In the case of a group health plan of a small employer which provides health insurance coverage solely through a contract with a health insurance issuer, no tax shall be imposed by this section on the employer on any failure (other than a failure attributable to section 9811) which is solely because of the health insurance coverage offered by such issuer.

(2) Small employer.—

(A) In general.—For purposes of paragraph (1), the term "small employer" means, with respect to a calendar year and a plan year, an employer who employed an average of at least 2 but not more than 50 employees on business days during the preceding calendar year and who employs at least 2 employees on the first day of the plan year. For purposes of the preceding sentence, all persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 shall be treated as one employer.

(B) Employers not in existence in preceding year.— In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is a small

employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(C) Predecessors.—Any reference in this paragraph to an employer shall include a reference to any predecessor of such employer.

(3) Health insurance coverage; health insurance issuer.—For purposes of paragraph (1), the terms "health insurance coverage" and "health insurance issuer" have the respective meanings given such terms by section 9832.

(e) Liability for tax.—The following shall be liable for the tax imposed by subsection (a) on a failure:

(1) Except as otherwise provided in this subsection, the employer.

(2) In the case of a multiemployer plan, the plan.

(3) In the case of a failure under section 9803 (relating to guaranteed renewability) with respect to a plan described in subsection (f)(2)(B), the plan.

(f) Definitions.—For purposes of this section—

(1) Group health plan.—The term "group health plan" has the meaning given such term by section 9832(a).

(2) Specified multiple employer health plan.—The term "specified multiple employer health plan" means a group health plan which is—

(A) any multiemployer plan, or

(B) any multiple employer welfare arrangement (as defined in section 3(40) of the Employee Retirement Income Security Act of 1974, as in effect on the date of the enactment of this section).

(3) Correction.—A failure of a group health plan shall be treated as corrected if—

(A) such failure is retroactively undone to the extent possible, and

(B) the person to whom the failure relates is placed in a financial position which is as good as such person would have been in had such failure not occurred.

26 U.S.C. § 4980H provides:

§ 4980H. Shared responsibility for employers regarding health coverage.

(a) Large employers not offering health coverage.—If—

(1) any applicable large employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(2) at least one full-time employee of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee,

then there is hereby imposed on the employer an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

(b) Large employers offering coverage with employees who qualify for premium tax credits or cost-sharing reductions.—

(1) In general. —If—

(A) an applicable large employer offers to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(B) 1 or more full-time employees of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee,

then there is hereby imposed on the employer an assessable payment equal to the product of the number of full-time employees of the applicable large employer described in subparagraph (B) for such month and an amount equal to 1/12 of $3,000.

(2) Overall limitation.—The aggregate amount of tax determined under paragraph (1) with respect to all employees of an applicable large employer for any month shall not exceed the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

[(3) Repealed. Pub.L. 112-10, Div. B, Title VIII, § 1858(b)(4), Apr. 15, 2011, 125 Stat. 169]

(c) Definitions and special rules.—For purposes of this section—

(1) Applicable payment amount.—The term "applicable payment amount" means, with respect to any month, 1/12 of $2,000.

(2) Applicable large employer.—

(A) In general.— The term "applicable large employer" means, with respect to a calendar year, an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year.

(B) Exemption for certain employers.—

(i) In general.—An employer shall not be considered to employ more than 50 full-time employees if—

(I) the employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and

(II) the employees in excess of 50 employed during such 120-day period were seasonal workers.

(ii) Definition of seasonal workers.—

(C) Rules for determining employer size.—For purposes of this paragraph—

(i) Application of aggregation rule for employers.—All persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as 1 employer.

(ii) Employers not in existence in preceding year.—In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is an applicable large employer shall be based on the average number of employees that it is reasonably

expected such employer will employ on business days in the current calendar year.

(iii) Predecessors.—Any reference in this subsection to an employer shall include a reference to any predecessor of such employer.

(D) Application of employer size to assessable penalties—

(i) In general.—The number of individuals employed by an applicable large employer as full-time employees during any month shall be reduced by 30 solely for purposes of calculating—

(I) the assessable payment under subsection (a), or

(II) the overall limitation under subsection (b)(2).

(ii) Aggregation—In the case of persons treated as 1 employer under subparagraph (C)(i), only 1 reduction under subclause (I) or (II) shall be allowed with respect to such persons and such reduction shall be allocated among such persons ratably on the basis of the number of full-time employees employed by each such person.

(E) Full-time equivalents treated as full-time employees.—Solely for purposes of determining whether an employer is an applicable large employer under this paragraph, an employer shall, in addition to the number of full-time employees for any month otherwise determined, include for such month a number of full-time employees determined by dividing the aggregate number of hours of service of employees who are not full-time employees for the month by 120.

(3) Applicable premium tax credit and cost-sharing reduction.—The term "applicable premium tax credit and cost-sharing reduction" means—

(A) any premium tax credit allowed under section 36B,

(B) any cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act, and

(C) any advance payment of such credit or reduction under section 1412 of such Act.

(4) Full-time employee—

(A) In general.—The term "full-time employee" means, with respect to any month, an employee who is employed on average at least 30 hours of service per week.

(B) Hours of service.—The Secretary, in consultation with the Secretary of Labor, shall prescribe such regulations, rules, and guidance as may be necessary to determine the hours of service of an employee, including rules for the application of this paragraph to employees who are not compensated on an hourly basis.

(5) Inflation adjustment.—

(A) In general.—In the case of any calendar year after 2014, each of the dollar amounts in subsection (b) and paragraph (1) shall be increased by an amount equal to the product of

(i) such dollar amount, and

(ii) the premium adjustment percentage (as defined in section 1302(c)(4) of the Patient Protection and Affordable Care Act) for the calendar year.

(B) Rounding.—If the amount of any increase under subparagraph (A) is not a multiple of $10, such increase shall be rounded to the next lowest multiple of $10.

(6) Other definitions.—Any term used in this section which is also used in the Patient Protection and Affordable Care Act shall have the same meaning as when used in such Act.

(7) Tax nondeductible.—For denial of deduction for the tax imposed by this section, see section 275(a)(6).

(d) Administration and procedure.—

(1) In general.—Any assessable payment provided by this section shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) Time for payment.—The Secretary may provide for the payment of any assessable payment provided by this section on an annual, monthly, or other periodic basis as the Secretary may prescribe.

(3) Coordination with credits, etc.— The Secretary shall prescribe rules, regulations, or guidance for the repayment of any assessable payment (including interest) if such payment is based on the allowance or payment of an applicable premium tax credit or cost-sharing reduction with respect to an employee, such allowance or payment is subsequently disallowed, and the assessable payment would not have been required to be made but for such allowance or payment.

26 C.F.R. § 54.9815–2713 provides:

§ 54.9815–2713 Coverage of preventive health services

(a) Services—

(1) In general. Beginning at the time described in paragraph (b) of this section and subject to

§ 54.9815–2713A, a group health plan, or a health insurance issuer offering group health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) [Reserved]

(ii) [Reserved]

(iii) [Reserved]

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration, in accordance with 45 CFR 147.131(a).

(2) Office visits. [Reserved]

(3) Out-of-network providers. [Reserved]

(4) Reasonable medical management. [Reserved]

(5) Services not described. [Reserved]

(b) Timing. [Reserved]

(c) Recommendations not current. [Reserved]

(d) Effective/applicability date. April 16, 2012.

26 C.F.R. § 54.9815–2713A provides:

§ 54.9815–2713A. Accommodations in connection with coverage of preventive health services

(a) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretaries of Health and Human Services and Labor, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) Contraceptive coverage—self-insured group health plans—(1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph

(b)(1) of this section are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides each third party administrator that will process claims for any

contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) with a copy of the self-certification described in paragraph (a)(4) of this section, which shall include notice that—

(A) The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(B) Obligations of the third party administrator are set forth in 29 CFR 2510.3–16 and 26 CFR 54.9815–2713A.

(iii) The eligible organization must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements.

(2) If a third party administrator receives a copy of the self-certification described in paragraph (a)(4) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods—

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or

indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(c) Contraceptive coverage--insured group health plans—(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in paragraph (a)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self-

certification from the eligible organization regarding its status as such.

(2) Payments for contraceptive services—(i) A group health insurance issuer that receives a copy of the self-certification described in paragraph (a)(4) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 54.9815–2713(a)(1)(iv) must—

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 9815. If the group health plan of the eligible organization provides coverage for some but not all of

any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services—self-insured and insured group health plans. For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal

requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of third party administrator/health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(e) Reliance—insured group health plans—

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

(f)[Reserved]. For further guidance, see § 54.9815-2713AT(f).

26 C.F.R. § 54.9815-2713AT provides:

§ 54.9815-2713AT Accommodations in connection with coverage of preventive health services (temporary).

(a)[Reserved]. For further guidance, see § 54.9815-2713A(a).

(b)Contraceptive coverage--self-insured group health plans. (1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides either a copy of the self-certification to each third party administrator or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage of all or a subset of contraceptive services.

(A) When a copy of the self-certification is provided directly to a third party administrator, such self-certification must include notice that obligations of the third party administrator are set forth in 29 CFR 2510.3-16 and this section and under § 54.9815-2713A.

(B) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on sincerely held religious beliefs to coverage of some or all contraceptive services (including an

identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Labor (working with the Department of Health and Human Services), will send a separate notification to each of the plan's third party administrators informing the third party administrator that the Secretary of Health and Human Services has received a notice under paragraph (b)(1)(ii) of this section and describing the obligations of the third party administrator under 29 CFR 2510.3-16 and this section and under § 54.9815-2713A.

(2) If a third party administrator receives a copy of the self-certification from an eligible organization or a notification from the Department of Labor, as described in paragraph (b)(1)(ii) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods--

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment,

coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than a copy of the self-certification from the eligible organization or notification from the Department of Labor described in paragraph (b)(1)(ii) of this section.

(c) Contraceptive coverage--insured group health plans-- (1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan provides either a copy of the self-certification to each issuer providing coverage in connection with the

plan or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage for all or a subset of contraceptive services.

(i) When a copy of the self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 54.9815-2713. An issuer may not require any further documentation from the eligible organization regarding its status as such.

(ii) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on its sincerely held religious beliefs to coverage of some or all contraceptive services, as applicable (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Health and Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of Health and Human Services has received a notice under paragraph (c)(1)

of this section and describing the obligations of the issuer under this section and under § 54.9815-2713A.

(2) Payments for contraceptive services.

(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (b)(1)(ii) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 54.9815-2713(a)(1)(iv) must--

(ii)[Reserved]. For further guidance, see § 54.9815-2713A(c)(2)(ii).

(d) [Reserved]. For further guidance, see § 54.9815-2713A(d).

(e) [Reserved]. For further guidance, see § 54.9815-2713A(e).

(f) Expiration date. This section expires on August 22, 2017 or on such earlier date as may be provided in final regulations or other action published in the Federal Register.

29 C.F.R. §§ 2510.3-16 provides:

§ 2510.3-16 Definition of "plan administrator."

(a) In general. The term "plan administrator" or "administrator" means the person specifically so designated by the terms of the instrument under which the plan is operated. If an administrator is not so designated, the plan administrator is the plan sponsor, as defined in section 3(16)(B) of ERISA.

(b) In the case of a self-insured group health plan established or maintained by an eligible organization, as defined in § 2590.715-2713A(a) of this chapter, if the eligible organization provides a copy of the self-

certification of its objection to administering or funding any contraceptive benefits in accordance with § 2590.715-2713A(b)(1)(ii) of this chapter to a third party administrator, the self-certification shall be an instrument under which the plan is operated, shall be treated as a designation of the third party administrator as the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) of this chapter to which the eligible organization objects on religious grounds, and shall supersede any earlier designation. If, instead, the eligible organization notifies the Secretary of Health and Human Services of its objection to administering or funding any contraceptive benefits in accordance with § 2590.715-2713A(b)(1)(ii) of this chapter, the Department of Labor, working with the Department of Health and Human Services, shall separately provide notification to each third party administrator that such third party administrator shall be the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) of this chapter to which the eligible organization objects on religious grounds, with respect to benefits for contraceptive services that the third party administrator would otherwise manage. Such notification from the Department of Labor shall be an instrument under which the plan is operated and shall supersede any earlier designation.

(c) A third party administrator that becomes a plan administrator pursuant to this section shall be responsible for--

(1) Complying with section 2713 of the Public Health Service Act (42 U.S.C. 300gg-13) (as incorporated into section 715 of ERISA) and § 2590.715-2713 of this chapter with respect to coverage of contraceptive services. To the extent the plan contracts with different third party administrators for different classifications of benefits (such as prescription drug benefits versus inpatient and outpatient benefits), each third party administrator is responsible for providing contraceptive coverage that complies with section 2713 of the Public Health Service Act (as incorporated into section 715 of ERISA) and § 2590.715-2713 of this chapter with respect to the classification or classifications of benefits subject to its contract.

(2) Establishing and operating a procedure for determining such claims for contraceptive services in accordance with § 2560.503-1 of this chapter.

(3) Complying with disclosure and other requirements applicable to group health plans under Title I of ERISA with respect to such benefits.

29 C.F.R. § 2590.715–2713 provides:

§ 2590.715–2713 Coverage of preventive health services

(a) Services—

(1) In general. Beginning at the time described in paragraph (b) of this section and subject to § 2590.715–2713A, a group health plan, or a health insurance issuer offering group health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment,

coinsurance, or a deductible) with respect to those items and services:

(i) Evidence-based items or services that have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual involved (except as otherwise provided in paragraph (c) of this section);

(ii) Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved (for this purpose, a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention is considered in effect after it has been adopted by the Director of the Centers for Disease Control and Prevention, and a recommendation is considered to be for routine use if it is listed on the Immunization Schedules of the Centers for Disease Control and Prevention);

(iii) With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration; and

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration, in accordance with 45 CFR 147.131(a).

(2) Office visits—

(i) If an item or service described in paragraph (a)(1) of this section is billed separately (or is tracked as individual encounter data separately) from an office visit, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(ii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is the delivery of such an item or service, then a plan or issuer may not impose cost-sharing requirements with respect to the office visit.

(iii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is not the delivery of such an item or service, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(iv) The rules of this paragraph (a)(2) are illustrated by the following examples:

Example 1.

(i) Facts. An individual covered by a group health plan visits an in-network health care provider. While visiting the provider, the individual is screened for cholesterol abnormalities, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit and for the laboratory work of the cholesterol screening test.

(ii) Conclusion. In this Example 1, the plan may not impose any cost-sharing requirements with respect to the separately-billed laboratory work of the cholesterol screening test. Because the office visit is billed separately from the cholesterol screening test, the plan may impose cost-sharing requirements for the office visit.

Example 2.

(i) Facts. Same facts as Example 1. As the result of the screening, the individual is diagnosed with hyperlipidemia and is prescribed a course of treatment that is not included in the recommendations under paragraph (a)(1) of this section.

(ii) Conclusion. In this Example 2, because the treatment is not included in the recommendations under paragraph (a)(1) of this section, the plan is not prohibited from imposing cost-sharing requirements with respect to the treatment.

Example 3.

(i) Facts. An individual covered by a group health plan visits an in-network health care provider to discuss recurring abdominal pain. During the visit, the individual has a blood pressure screening, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 3, the blood pressure screening is provided as part of an office visit for which the primary purpose was not to deliver items or services described in paragraph (a)(1) of this

section. Therefore, the plan may impose a cost-sharing requirement for the office visit charge.

Example 4.

(i) Facts. A child covered by a group health plan visits an in-network pediatrician to receive an annual physical exam described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. During the office visit, the child receives additional items and services that are not described in the comprehensive guidelines supported by the Health Resources and Services Administration, nor otherwise described in paragraph (a)(1) of this section. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 4, the service was not billed as a separate charge and was billed as part of an office visit. Moreover, the primary purpose for the visit was to deliver items and services described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. Therefore, the plan may not impose a cost-sharing requirement with respect to the office visit.

(3) Out-of-network providers. Nothing in this section requires a plan or issuer that has a network of providers to provide benefits for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider. Moreover, nothing in this section precludes a plan or issuer that has a network of providers from imposing cost-sharing requirements for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider.

(4) Reasonable medical management. Nothing prevents a plan or issuer from using reasonable

medical management techniques to determine the frequency, method, treatment, or setting for an item or service described in paragraph (a)(1) of this section to the extent not specified in the recommendation or guideline.

(5) Services not described. Nothing in this section prohibits a plan or issuer from providing coverage for items and services in addition to those recommended by the United States Preventive Services Task Force or the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, or provided for by guidelines supported by the Health Resources and Services Administration, or from denying coverage for items and services that are not recommended by that task force or that advisory committee, or under those guidelines. A plan or issuer may impose cost-sharing requirements for a treatment not described in paragraph (a)(1) of this section, even if the treatment results from an item or service described in paragraph (a)(1) of this section.

(b) Timing—

(1) In general. A plan or issuer must provide coverage pursuant to paragraph (a)(1) of this section for plan years that begin on or after September 23, 2010, or, if later, for plan years that begin on or after the date that is one year after the date the recommendation or guideline is issued.

(2) Changes in recommendations or guidelines. A plan or issuer is not required under this section to provide coverage for any items and services specified in any recommendation or guideline described in paragraph (a)(1) of this section after the recommendation or guideline is no longer described

in paragraph (a)(1) of this section. Other requirements of Federal or State law may apply in connection with a plan or issuer ceasing to provide coverage for any such items or services, including PHS Act section 2715(d)(4), which requires a plan or issuer to give 60 days advance notice to an enrollee before any material modification will become effective.

(c) Recommendations not current. For purposes of paragraph (a)(1)(i) of this section, and for purposes of any other provision of law, recommendations of the United States Preventive Services Task Force regarding breast cancer screening, mammography, and prevention issued in or around November 2009 are not considered to be current.

(d) Applicability date. The provisions of this section apply for plan years beginning on or after September 23, 2010. See § 2590.715–1251 of this Part for determining the application of this section to grandfathered health plans (providing that these rules regarding coverage of preventive health services do not apply to grandfathered health plans).

29 C.F.R. § 2590.715-2713A

§ 2590.715-2713A. Accommodations in connection with coverage of preventive health services

(a) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) Contraceptive coverage--self-insured group health plans—

(1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides either a copy of the self-certification to each third party administrator or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage of all or a subset of contraceptive services.

(A) When a copy of the self-certification is provided directly to a third party administrator, such self-certification must include notice that obligations of the third party administrator are set forth in § 2510.3-16 of this chapter and this section.

(B) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on sincerely held religious beliefs to coverage of some or all contraceptive services (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Labor (working with the Department of Health and Human Services), shall send a separate notification to each of the plan's third party administrators informing the third party administrator that the Secretary of Health and Human Services has received a notice under paragraph (b)(1)(ii) of this section and describing the obligations of the third party administrator under § 2510.3-16 of this chapter and this section.

(2) If a third party administrator receives a copy of the self-certification from an eligible organization or

a notification from the Department of Labor, as described in paragraph (b)(1)(ii) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods--

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than a copy of the self-certification from the eligible organization or

notification from the Department of Labor described in paragraph (b)(1)(ii) of this section.

(c) Contraceptive coverage--insured group health plans –

(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan provides either a copy of the self-certification to each issuer providing coverage in connection with the plan or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage for all or a subset of contraceptive services.

(i) When a copy of the self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 2590.715-2713. An issuer may not require any further documentation from the eligible organization regarding its status as such.

(ii) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on its sincerely held religious beliefs to coverage of some or all contraceptive services, as applicable (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR

147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Health and Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of Health and Human Services has received a notice under paragraph (c)(1) of this section and describing the obligations of the issuer under this section.

(2) Payments for contraceptive services --(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (c)(1)(ii) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 2590.715-2713(a)(1)(iv) must--

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other

charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 715 of ERISA. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services--self-insured and insured group health plans. For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on

the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of third party administrator/health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(e) Reliance--insured group health plans –

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive

coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

45 C.F.R. § 147.130 provides:

§ 147.130 Coverage of preventive health services. (a) Services—

(1) In general. Beginning at the time described in paragraph (b) of this section and subject to § 147.131, a group health plan, or a health insurance issuer offering group or individual health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) Evidence-based items or services that have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual involved (except as otherwise provided in paragraph (c) of this section);

(ii) Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved (for this purpose, a recommendation from

the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention is considered in effect after it has been adopted by the Director of the Centers for Disease Control and Prevention, and a recommendation is considered to be for routine use if it is listed on the Immunization Schedules of the Centers for Disease Control and Prevention);

(iii) With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration; and

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration.

(A) In developing the binding health plan coverage guidelines specified in this paragraph (a)(1)(iv), the Health Resources and Services Administration shall be informed by evidence and may establish exemptions from such guidelines with respect to group health plans established or maintained by religious employers and health insurance coverage provided in connection with group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services under such guidelines.

(B) For purposes of this subsection, a "religious employer" is an organization that meets all of the following criteria:

(1) The inculcation of religious values is the purpose of the organization.

(2) The organization primarily employs persons who share the religious tenets of the organization.

(3) The organization serves primarily persons who share the religious tenets of the organization.

(4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

(2) Office visits—

(i) If an item or service described in paragraph (a)(1) of this section is billed separately (or is tracked as individual encounter data separately) from an office visit, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(ii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is the delivery of such an item or service, then a plan or issuer may not impose cost-sharing requirements with respect to the office visit.

(iii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is not the delivery of such an item or service, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(iv) The rules of this paragraph (a)(2) are illustrated by the following examples:

Example 1. (i) Facts. An individual covered by a group health plan visits an in-network health care provider. While visiting the provider, the individual is screened for cholesterol abnormalities, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit and for the laboratory work of the cholesterol screening test.

(ii) Conclusion. In this Example 1, the plan may not impose any cost-sharing requirements with respect to the separately-billed laboratory work of the cholesterol screening test. Because the office visit is billed separately from the cholesterol screening test, the plan may impose cost-sharing requirements for the office visit.

Example 2.

(i) Facts. Same facts as Example 1. As the result of the screening, the individual is diagnosed with hyperlipidemia and is prescribed a course of treatment that is not included in the recommendations under paragraph (a)(1) of this section.

(ii) Conclusion. In this Example 2, because the treatment is not included in the recommendations under paragraph (a)(1) of this section, the plan is not prohibited from imposing cost-sharing requirements with respect to the treatment.

Example 3.

(i) Facts. An individual covered by a group health plan visits an in-network health care provider to discuss recurring abdominal pain. During the visit, the individual has a blood pressure screening, which

has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 3, the blood pressure screening is provided as part of an office visit for which the primary purpose was not to deliver items or services described in paragraph (a)(1) of this section. Therefore, the plan may impose a cost-sharing requirement for the office visit charge.

Example 4.

(i) Facts. A child covered by a group health plan visits an in-network pediatrician to receive an annual physical exam described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. During the office visit, the child receives additional items and services that are not described in the comprehensive guidelines supported by the Health Resources and Services Administration, nor otherwise described in paragraph (a)(1) of this section. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 4, the service was not billed as a separate charge and was billed as part of an office visit. Moreover, the primary purpose for the visit was to deliver items and services described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. Therefore, the plan may not impose a cost-sharing requirement for the office visit charge.

(3) Out-of-network providers. Nothing in this section requires a plan or issuer that has a network of providers to provide benefits for items or services described in paragraph (a)(1) of this section that are

delivered by an out-of-network provider. Moreover, nothing in this section precludes a plan or issuer that has a network of providers from imposing cost-sharing requirements for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider.

(4) Reasonable medical management. Nothing prevents a plan or issuer from using reasonable medical management techniques to determine the frequency, method, treatment, or setting for an item or service described in paragraph (a)(1) of this section to the extent not specified in the recommendation or guideline.

(5) Services not described. Nothing in this section prohibits a plan or issuer from providing coverage for items and services in addition to those recommended by the United States Preventive Services Task Force or the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, or provided for by guidelines supported by the Health Resources and Services Administration, or from denying coverage for items and services that are not recommended by that task force or that advisory committee, or under those guidelines. A plan or issuer may impose cost-sharing requirements for a treatment not described in paragraph (a)(1) of this section, even if the treatment results from an item or service described in paragraph (a)(1) of this section.

(b) Timing—

(1) In general. A plan or issuer must provide coverage pursuant to paragraph (a)(1) of this section for plan years (in the individual market, policy years) that begin on or after September 23, 2010, or, if later,

for plan years (in the individual market, policy years) that begin on or after the date that is one year after the date the recommendation or guideline is issued.

(2) Changes in recommendations or guidelines. A plan or issuer is not required under this section to provide coverage for any items and services specified in any recommendation or guideline described in paragraph (a)(1) of this section after the recommendation or guideline is no longer described in paragraph (a)(1) of this section. Other requirements of Federal or State law may apply in connection with a plan or issuer ceasing to provide coverage for any such items or services, including PHS Act section 2715(d)(4), which requires a plan or issuer to give 60 days advance notice to an enrollee before any material modification will become effective.

(c) Recommendations not current. For purposes of paragraph (a)(1)(i) of this section, and for purposes of any other provision of law, recommendations of the United States Preventive Services Task Force regarding breast cancer screening, mammography, and prevention issued in or around November 2009 are not considered to be current.

(d) Applicability date. The provisions of this section apply for plan years (in the individual market, for policy years) beginning on or after September 23, 2010. See § 147.140 of this Part for determining the application of this section to grandfathered health plans (providing that these rules regarding coverage of preventive health services do not apply to grandfathered health plans).

45 C.F.R. § 147.131 provides:

§ 147.131 Exemption and accommodations in connection with coverage of preventive health services.

(a) Religious employers. In issuing guidelines under § 147.130(a)(1)(iv), the Health Resources and Services Administration may establish an exemption from such guidelines with respect to a group health plan established or maintained by a religious employer (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer) with respect to any requirement to cover contraceptive services under such guidelines. For purposes of this paragraph (a), a "religious employer" is an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

(b) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available

for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974.

(c) Contraceptive coverage—insured group health plans—

(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan provides either a copy of the self-certification to each issuer providing coverage in connection with the plan or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage for all or a subset of contraceptive services.

(i) When a self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 147.130. An issuer may not require any further documentation from the eligible organization regarding its status as such.

(ii) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection

based on its sincerely held religious beliefs to coverage of some or all contraceptive services, as applicable (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of § 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Health and Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of Health and Human Services has received a notice under paragraph (c)(1) of this section and describing the obligations of the issuer under this section.

(2) Payments for contraceptive services—

(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (c)(1)(ii) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 147.130(a)(1)(iv) must--

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under

§ 147.130(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 147.130(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services--insured group health plans and student health insurance coverage. For each plan year to which the accommodation in paragraph (c) of this section is to apply, an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive

services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the issuer provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your [employer/institution of higher education] has certified that your [group health plan/student health insurance coverage] qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your [employer/institution of higher education] will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of health insurance issuer] will provide separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your [group health plan/student health insurance coverage]. Your [employer/institution of higher education] will not administer or fund these payments. If you have any questions about this notice, contact [contact information for health insurance issuer]."

(e) Reliance –

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

(f) Application to student health insurance coverage. The provisions of this section apply to student health insurance coverage arranged by an eligible organization that is an institution of higher education in a manner comparable to that in which they apply to group health insurance coverage provided in connection with a group health plan established or maintained by an eligible organization that is an employer. In applying this section in the case of student health insurance coverage, a reference to "plan participants and beneficiaries" is a reference to student enrollees and their covered dependents.